

**THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY**

UNIVERSITY OF LONDON LIBRARY

346.4
Mx. North Coll.





Digitized by the Internet Archive
in 2026

THE
INCORPORATED COUNCIL OF LAW REPORTING
FOR
ENGLAND AND WALES.

Members of the Council.

Chairman—SIR H. F. DICKENS, K.C.

Vice-Chairman—SIR THOMAS R. HUGHES, K.C.

EX-OFFICIO MEMBERS.

SIR W. A. JOWITT, M.P. . . . ATTORNEY-GENERAL.
SIR J. B. MELVILLE, M.P. . . . SOLICITOR-GENERAL.
WALTER HENRY FOSTER, Esq., President of the Law Society.

ELECTED MEMBERS.

SIR HERBERT CUNLIFFE, K.C., M.P.	}	Lincoln's Inn.
ALFRED ADAMS, Esq.		
SIR H. F. DICKENS, K.C.	}	Inner Temple.
F. P. M. SCHILLER, Esq., K.C.		
ARTHUR POWELL, Esq., K.C.	}	Middle Temple.
W. E. VERNON, Esq.		
EDWARD CLAYTON, Esq., K.C.	}	Gray's Inn.
SIR W. GREAVES-LORD, K.C., M.P.		
SIR THOMAS R. HUGHES, K.C., of Lincoln's Inn	}	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
E. W. HANSELL, Esq., K.C., of the Inner Temple.		
SIR A. COPSON PEAKE (Firm—Messrs. Barwick, Peake & Milling, Leeds).	}	The Law Society.
G. S. POTT, Esq. (Firm—Messrs. Holmes, Son & Pott).		

Secretary—P. NOBLE FAWCETT, Esq., 30, Montague Street, W.C. 1.

1929.

THE
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE,
AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

REPORTERS.

Court of Appeal . . .	{ W. IVIMEY COOK,	} <i>Barristers-at-Law.</i>
	H. C. GARSIA	
Probate and Divorce . . .	R. M. MIDDLETON,	<i>Barrister-at-Law.</i>
Admiralty Cases . . .	E. C. M. TREHERN,	<i>Barrister-at-Law.</i>
Ecclesiastical Cases . . .	W. L. L. BELL.	<i>Barrister-at-Law.</i>

1929.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

1938

LAW REPORTS

WILLIAM BAKER

OF THE

NEW YORK

LIBRARY

OF THE

NEW YORK

LIBRARY

OF THE

NEW YORK

LIBRARY

OF THE

NEW YORK

LIBRARY

OF THE

NEW YORK

LIBRARY

OF THE

NEW YORK

LIBRARY

OF THE

NEW YORK

LIBRARY

OF THE

NEW YORK

LIBRARY

OF THE

NEW YORK



JUDGES
OF
THE COURT OF APPEAL.
1929.

Lord (now Viscount) HAILSHAM.	}	Lords Chancellors.
Lord SANKEY.		

Lord HEWART, Lord Chief Justice of England.

Lord HANWORTH, Master of the Rolls.

Lord MERRIVALE,	}	President of the Probate, Divorce, and Admiralty Division.

Sir T. E. SCRUTTON,	}	Ordinary Judges of Court of Appeal.
Sir P. O. LAWRENCE,		
Sir F. A. GREER,		
Hon. F. RUSSELL,		
Sir H. H. SLESSER.		

J U D G E S
OF THE
PROBATE, DIVORCE AND ADMIRALTY DIVISION
OF
THE HIGH COURT OF JUSTICE.

1929.

Lord MERRIVALE, President.
Sir MAURICE HILL.
Sir A. D. BATESON.

ERRATA.

<i>Page.</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
131	headnote line 2	"guilt "	"innocence "
157	footnote (2)	should read	"Reversed in C. A. April 19, 1929. The Court, not dealing with the question of jurisdiction, held that the order of Bateson J. was an inchoate order and should be set aside, and gave liberty to the father of the child to apply to Bateson J. for a definite order "
237	11		"to release part only of the balance to Mr. Prinsep and to resettle the rest "
248	footnote (2)	[1910] P. 300	[1909] P. 300

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1929, will be as follows :—

In the First Series,
[1929] 1 Ch. [1929] 2 Ch.

In the Second Series,
[1929] 1 K. B. [1929] 2 K. B. [1929] P.

In the Third Series,
[1929] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.		N.	
	PAGE		PAGE
Alston <i>v.</i> Alston	311	Normanstar, The	233
B.		P.	
Birch, In the Estate of	164	Palembang, The	246
Bordass, In the Estate of	107	Princess, The	287
		Prinsep <i>v.</i> Prinsep	225, 265
G.		R.	
Green <i>v.</i> Green	101	Ruapehu (No. 2), The	305
H.		S.	
Hauxton Parochial Church		Sherwood <i>v.</i> Sherwood (C. A.)	120
Council <i>v.</i> Stevens	240	Skipwith <i>v.</i> Skipwith (C. A.)	93
Hayle, The	275	Statham <i>v.</i> Statham (C. A.)	131
Hughes <i>v.</i> Hughes (C. A.)	1	Stevens, Hauxton Parochial	
Hyman <i>v.</i> Hyman (C. A.)	1	Church Council <i>v.</i>	240
J.		T.	
Janion <i>v.</i> Janion	237n.	Taylor, In the Estate of	260
Johnstone <i>v.</i> Johnstone (C. A.)	165	Tovarisch, The	293

V.		Y.	
	PAGE		PAGE
Vectis, The	204	York, The	(C. A.) 178
Vigon <i>v.</i> Vigon	157	Young Sid, The	109
	(C. A.) 245		(C. A.) 190
W.		Z.	
Webb <i>v.</i> Webb	159		
Williams <i>v.</i> Williams	114	Zillah, The	266

TABLE OF CASES CITED.

A.

	PAGE
Acanthus, The [1902] P. 17	180
Active, The 2 Ll. L. Rep. 505	205
Admiralty Commissioners v. The Chekiang	[1926] A. C. 637 180
Susquehanna	[1926] A. C. 655 180
Aktieselskabet Dampskibet Forto v. Orkney Harbour Commissioners	1915 S. C. 743 281
Aldridge v. Aldridge	13 P. D. 210 77
Allen v. Allen	[1894] P. 134 115
Alms Corn Charity, In re	[1901] 2 Ch. 750 242
Anglo - Newfoundland Development Company v. Pacific Steam Navigation Company	[1924] A. C. 406 206
Argentino, The	13 P. D. 191. 180

B.

Baddeley v. Granville (Earl)	19 Q. B. D. 423 15
Banbury v. Bank of Montreal	[1918] A. C. 626 138
Bank Line v. Arthur Capel & Co.	[1919] A. C. 435 34
Barnardo v. McHugh	[1891] A. C. 388 105
Barraclough v. Brown	[1897] A. C. 615 158
Bednall v. Bednall	[1927] P. 225 101
Beever v. Beever	3 Phillim. 261 168
Benyon v. Benyon	1 P. D. 447 4
Bernina, The	12 P. D. 58 219
Besant v. Wood	12 Ch. D. 605 4
Birch, In the Estate of	[1929] W. N. 42 264
Bishop v. Bishop	[1897] P. 138 4
Blakeley v. Muller & Co.	[1903] 2 K. B. 760n. 34
Blood v. Blood.	[1902] P. 78 228
Board of Trade v. Cayzer, Irvine & Co.	[1927] A. C. 610 32
Bordass, In the Estate of	[1929] P. 107 164, 261
Bosworthick v. Bosworthick	[1926] P. 159; [1927] P. 64 9, 16, 228
Bridgett and Hayes' Contract, In re	[1928] Ch. 163 107, 260
Brown v. Brown	L. R. 3 P. & M. 202 33

C.

Canton, The	31 Ll. L. Rep. 289 109, 191, 206
Cartwright v. Cartwright	3 D. M. & G. 982 20
Cayzer v. Carron Company	9 App. Cas. 873 211

		PAGE
Ceto, The	14 App. Cas. 670	109, 193
Chandler v. Webster	[1904] 1 K. B. 493	34
Charlesworth v. Holt	L. R. 9 Ex. 38	1
Churchward v. Churchward	[1895] P. 7	28
City of Edinburgh, The	[1921] P. 274	307
Civil Service Co-operative Society v. General Steam Navigation Company }	[1903] 2 K. B. 756	34
Clara Camus, The	23 Ll. L. Rep. 181	110
Clark v. Clark	[1906] P. 331	115
Clifford v. Clifford	9 P. D. 76	9
Curtis v. Curtis	4 Sw. & Tr. 234	136

D.

Dagmar, The	[1929] W. N. 78	247
David Payne & Co., Ltd., In re	[1904] 2 Ch. 608	280
Davies v. Mann	10 M. & W. 546	205
Dayrell-Steyning v. Dayrell-Steyning	[1922] P. 280	120
Dent v. Dent	4 Sw. & Tr. 105	137
Donald Campbell & Co. v. Pollak	[1927] A. C. 732	191
Dormer v. Ward	[1901] P. 20	229
Dunstanborough, The	[1892] P. 363n.	204
Durant v. Durant	1 Hagg. Ec. 733	136

E.

Elderslie Steamship Company v. Borthwick }	[1905] A. C. 93	281
Ely (Bishop) v. Gibbons	4 Hagg. 156	243
Empress Eugénie, The	Lush. 138	201
Esk, The	L. R. 2 A. & E. 350	246
Essequibo, The	13 P. D. 51	293

F.

Fearon v. Aylesford (Earl)	14 Q. B. D. 792	39
Fenwick, Stobart & Co., In re	[1902] 1 Ch. 507	278
Forbes, Abbott & Lennard v. Great Western Railway Company }	17 Asp. M. L. C. 347	279
Fox v. Fox	[1925] P. 157	97
Friedsberg, The	10 P. D. 112	195
Fuller v. Benett	2 Hare, 394	277
Fyenoord, The	Swa. 374	109, 193

G.

Gandy v. Gandy	7 P. D. 77, 168; 30 Ch. D. 57	3
Geils v. Geils	6 N. C. 97	136
Gibbings, In the Estates of	[1928] P. 28	262
Glenfinlas, The	[1918] P. 363n.	180
Goslin v. Clark	12 C. B. (N. S.) 681	5

	PAGE
Graham v. Graham	[1923] P. 31 166
Gran v. Gran	{ Times Newsp. 1921, Feb. 15, Mar. 1, 19 166
Griffin v. Dighton	5 B. & S. 93 242

H.

H.M.S. Sans Pareil	[1900] P. 267 212
H. v. W.	3 K. & J. 382 46
Hall, Ltd., and Pim & Co.'s Arbitration, In re	{ 139 L. T. 50 188
Hargreaves v. Hargreaves	[1926] P. 42 228
Harriman v. Harriman	[1909] P. 123 141
Harrison v. Harrison	{ [1909] P. 123; [1910] 1 K. B. 35 20, 28
Hero, The	[1912] A. C. 300 206
Hodgson Roberts v. Hodgson Roberts.	[1906] P. 142 228
Hooper v. Hooper	[1919] P. 153 95
Hope-Johnstone, In re	[1904] 1 Ch. 470 16
Hornet, The	[1892] P. 361 211
Hunt v. Hunt	4 D. F. & J. 221 21

I.

Imbro, The	14 P. D. 73 297
Indermaur v. Dames	L. R. 2 C. P. 311 278

J.

Janion v. Janion	{ Unreported. See [1929] P. 237n. 225, 314
Judd v. Judd	[1907] P. 241 136
Judkins v. Judkins	[1897] P. 138 4
Julia, The	Lush. 224 205
Jump v. Jump	8 P. D. 159 9
Jupiter, The	28 Ll. L. Rep. 224 205

K.

Kaiser Wilhelm II., The	85 L. J. (P.) 26 205
Karama, The	[1921] P. 76 110
.	[1922] 1 A. C. 68 206
Keats v. Keats	1 Sw. & Tr. 334 137
Kingsway, The	[1918] P. 344 180
Krell v. Henry	[1903] 2 K. B. 740 34

L.

Lanchbury v. Bode	[1898] 2 Ch. 120 243
Letang v. Ottawa Electric Railway Company	{ [1926] A. C. 725 206
Lorraine v. Lorraine	[1912] 86, 222 228, 239

M.

	PAGE
Macfarlane v. Jackson	[1908] P. 308 102
Main, The	11 P. D. 132 293
Malzy v. Eichholz	[1916] 2 K. B. 308 3
Manders v. Manders	[1897] 1 Q. B. 474 158
Margaret, The	6 P. D. 76 205
_____	9 App. Cas. 873 205
Marshall v. Marshall	5 P. D. 19 4
Merchant Prince, The	[1892] P. 179 288
Meredyth v. Meredyth	[1895] P. 92 160
Metropolitan Water Board v. Dick, }	[1917] 2 K. B. 1 ; [1918] A. C.
Kerr & Co.	119 34
Meunier, In re	[1894] 2 Q. B. 415 149
Modica, The	[1926] P. 72 110
Mogg v. Mogg	2 Add. 292 136
Monte Rosa, The	[1893] P. 23 204
Moosbrugger v. Moosbrugger	{ 109 L. T. 192 ; 29 Times L. R.
_____	715 136
Morley v. Leacroft	[1896] P. 92 242
Morrall v. Morrall	6 P. D. 98 4
Morrissey v. Morrissey	[1905] P. 90 161

N.

N. v. N.	3 Sw. & Tr. 234 131
Nador, The	[1909] P. 300 248, 250
Nelson Line v. James Nelson & Sons	[1908] A. C. 16 280
Nepean v. Nepean	[1925] P. 97 231
Noel v. Noel	10 P. D. 179 231

O.

Orduna, The	[1919] P. 381 110, 304
Orion, The	[1891] P. 307 299
Ovingdean Grange, The	[1902] P. 208 206

P.

Palmer v. Palmer	2 Sw. & Tr. 61 137
Peter Benoit, The	{ (1913) Fo. 429 ; 84 L. J. (P.)
_____	87 110
_____	13 Asp. M. L. C. 203 206
Plym, The	9 Ll. L. Rep. 489 205
Prinsep v. Prinsep	[1929] P. 225 314

R.

Reg. v. Jellyman	8 Car. & P. 604 131
— v. Lewis	9 Times L. R. 226 105
— v. Wollaston	12 Cox, 180 137
Reid v. Reid	[1926] P. 1 6
Rex v. Baskerville	[1916] 2 K. B. 658 131
— v. New	20 Times L. R. 515 105
— v. Tate	[1908] 2 K. B. 680 131

	PAGE
Ritter <i>v.</i> Godfrey	[1920] 2 K. B. 47 194
Robertson <i>v.</i> Robertson	6 P. D. 119 115
Rolland <i>v.</i> Hart	L. R. 6 Ch. 678 277
Romance, The	[1901] P. 15 247
Rose <i>v.</i> Rose	8 P. D. 98 14
Ruabon SS. Company <i>v.</i> London Assurance	[1900] A. C. 6 180
Ruapehu, The	[1927] A. C. 523 306
Russell <i>v.</i> Russell	{ [1895] P. 315 ; [1897] A. C. 395 137, 148

S.

St. Aubin, The	[1907] P. 60 288
Sans Pareil (H.M.S.).	[1900] P. 267 212
Scott <i>v.</i> Avery	5 H. L. C. 811 32
Serjeant Davies' Case	2 Rolle, 211 242
Slowman <i>v.</i> Longrevil (Churchwardens)	2 Keb. 742 243
Smallbones <i>v.</i> Edney	L. R. 3 P. C. 444 242
Smith <i>v.</i> Smith	[1923] P. 128 165
Spaight <i>v.</i> Tedcastle	6 App. Cas. 217 205
Stone <i>v.</i> Stone	3 Sw. & Tr. 372 229
Strathfillan, The <i>v.</i> The Ikala	[1929] A. C. 196 180

T.

Tamplin Steamship Company <i>v.</i> Anglo-Mexican Petroleum Products Company	{ [1916] 2 A. C. 397 3
Thompson <i>v.</i> The King	[1918] A. C. 221 139
Tress <i>v.</i> Tress	12 P. D. 128 4

V.

Volute, The	[1922] 1 A. C. 129 205
-----------------------	----------------------------------

W.

Walpole <i>v.</i> Walpole	[1901] P. 196 161, 231
Walwyn <i>v.</i> Awberry	2 Mod. 254 242
Wasteneys <i>v.</i> Wasteneys	[1900] A. C. 446 35
Webster <i>v.</i> Ashton-under-Lyne Overseers	{ L. R. 8 C. P. 306 15
Wega, The	[1895] P. 156 248
Westmeath (Marquess) <i>v.</i> Salisbury (Marquess)	{ 5 Bli. N. R. 339 20
— <i>v.</i> Westmeath	2 Hagg. Ecc. Supp. 1 115
Whitton <i>v.</i> Whitton	[1901] P. 348 228
Wickins <i>v.</i> Wickins	[1918] P. 265 95
Wigney <i>v.</i> Wigney	7 P. D. 177 160
Wilkinson <i>v.</i> Wilkinson	69 L. T. 459 14
Williams <i>v.</i> Bailly	L. R. 2 Eq. 731 13
— <i>v.</i> Williams	67 L. J. Notes of Cases, 13 168
Wilson <i>v.</i> Wilson	8 H. L. C. 40 21
Worsley <i>v.</i> Worsley	L. R. 1 P. & M. 648 13, 228
Wynne <i>v.</i> Wynne	78 L. T. 796 160



CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

HYMAN *v.* HYMAN.

1928

March 6, 26.

HUGHES *v.* HUGHES.

C. A.

May 22, 23,
24; June 18.

Divorce—Deed of Separation—Covenant of wife not to sue for Alimony or Maintenance — Subsequent Decree Nisi on Wife's Petition — Petition for Permanent Maintenance—Limitation of Force of Covenant to Duration of Marriage—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190.

When in a deed of separation a wife covenants not to take proceedings to compel her husband to allow her alimony or maintenance beyond a stipulated amount and thereafter the wife obtains a decree for dissolution of the marriage on the ground of the husband's adultery, she no longer remains bound by the covenant but is free to take proceedings for permanent maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 :—

So held by Lord Hanworth M.R., Scrutton, Greer, and Sankey L.JJ. ; Lawrence and Russell L.JJ. dissenting.

Charlesworth v. Holt (1873) L. R. 9 Ex. 33 doubted by Lord Hanworth M.R., Scrutton and Sankey L.JJ.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

THESE two cases raised the question whether a wife was debarred by her covenant in a deed of separation not to sue for maintenance from petitioning for permanent maintenance after she had obtained a decree for dissolution of her marriage on the ground of the husband's adultery. The facts in these two cases, which are fully stated in the judgment of Lord Hanworth M.R., are hereinafter briefly set out. Both appeals were originally argued before Lord Hanworth M.R., Lawrence and Russell L.JJ., but it was afterwards ordered that they should be argued before the full Court of Appeal.

HYMAN v. HYMAN.

By a deed of separation dated September 20, 1919, Maurice Percy Hyman (the husband) and May Ward Hyman (the wife), referred to in the deed as May Hyman, who had intermarried on September 14, 1912, mutually agreed to live apart, and the husband for himself his executors and administrators covenanted to pay the wife the sum of 20*l.* a week free of income tax during her life for her maintenance and support, the sum of 200*l.* for the purpose of discharging her existing personal liabilities, and the further sum of 2000*l.* Walter Hyman joined in the deed to guarantee the payment of these sums. Clause 3 of the deed contained joint and several covenants by the wife and the trustees of the deed “(b) that neither the said May Hyman nor any person on her behalf shall at any time hereafter molest or disturb the said Maurice Percy Hyman or by any means either by taking out citation or process or by instituting any action in England or elsewhere or in any other manner compel the said Maurice Percy Hyman to cohabit with the said May Hyman or endeavour to enforce any restitution of conjugal rights or to compel the said Maurice Percy Hyman to allow her any alimony or maintenance further than the said weekly sum of 20*l.* and the aforesaid sums of 200*l.* and 2000*l.*”

On January 25, 1927, the wife obtained a decree nisi for the dissolution of the marriage on the ground of the husband's adultery, and on February 27, 1928, the decree was made absolute.

On February 7, 1928, the wife had petitioned for permanent maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, alleging that the husband had a yearly income of over 30,000*l*. The husband resisted the petition on the ground of the wife's covenant in the separation deed, and on October 31, 1927, an order was made for the hearing of a preliminary issue whether or not the petition for permanent maintenance should be dismissed on the ground that these proceedings were a breach of the covenant contained in clause 3 (b) of the deed of separation.

Hill J. held that the case was indistinguishable from *Hughes v. Hughes*, in which judgment had been given shortly before by Lord Merrivale P., and answered the issue by saying that the wife was not by reason of her covenant prevented from presenting the petition for permanent maintenance.

The husband appealed.

Sir H. Cunliffe K.C. and *H. D. Grazebrook* for the appellant. The wife's covenant is binding on her notwithstanding the subsequent divorce and she is not entitled to apply under the Supreme Court of Judicature (Consolidation) Act, s. 190, for permanent maintenance. It is settled law that after a decree for judicial separation such a covenant remains binding : *Gandy v. Gandy*. (1) For the present purpose there is no difference between judicial separation and divorce. This is not a case where the husband has repudiated his obligation under the deed of separation, as in the later stage of *Gandy v. Gandy*. (2) There is no justification for the implication that the wife's covenant is to be limited to the duration of the matrimonial tie. No such limitation can be read in, in the absence of express words so limiting it or of necessary implication producing the same result : *Charlesworth v. Holt*. (3) If that be so, the reasoning in the President's judgment in *Hughes v. Hughes* is incorrect. As to the difficulty of making such an implication see *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* (4) and *Malzy v. Eichholz*. (5) The

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

(1) (1882) 7 P. D. 77, 168.

(3) L. R. 9 Ex. 38, 40.

(2) (1885) 30 Ch. D. 57.

(4) [1916] 2 A. C. 397, 422.

(5) [1916] 2 K. B. 308, 313.

C. A. 1928 husband can enforce a covenant by the wife not to sue for restitution of conjugal rights : *Besant v. Wood* (1) ; *Marshall v. Marshall* (2) ; and similarly he can enforce a covenant not to sue for alimony even after a subsequent decree for judicial separation : *Gandy v. Gandy*. (3) It is not correct to say, as was done in *Tress v. Tress* (4), that the effect of the decision in *Gandy v. Gandy* (3) was shaken by the later decision in the same case. (5) The explanation of the later view was that by the time the case came before the Court of Appeal for the second time, the husband had repudiated the terms of the deed of separation by refusing to maintain the children of the marriage. That being so the wife was once more free to apply for alimony. It is true that in *Morrall v. Morrall* (6) the wife was held to be free of her covenant after obtaining a divorce on the ground of incestuous adultery. But it is suggested that the true view is that the husband was there treated as having committed an act amounting to repudiation.

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

[SCRUTTON L.J. referred to *Benyon v. Benyon*. (7)]

It is submitted that so long as there is no repudiation by the husband, the wife's covenant remains just as binding after divorce as after a decree for judicial separation.

The only other important cases to be considered were *Bishop v. Bishop* (8) and *Judkins v. Judkins* (8), which were heard together. Those cases are without authority here, because in neither of those cases was there a covenant not to sue for alimony or maintenance. It is not sufficient to say that the circumstances have changed in order to release a party from an obligation into which he has entered. Nor is there any difference in the powers of the Court as regards judicial separation and divorce. To enable the wife to act contrary to her covenant there must have been conduct by the husband amounting to a repudiation of the agreement between them. The ground on which it was said that a wife could contract out of her claim for alimony after judicial

(1) (1879) 12 Ch. D. 605.

(2) (1879) 5 P. D. 19.

(3) 7 P. D. 168.

(4) (1887) 12 P. D. 128, 129.

(5) (1885) 30 Ch. D. 57.

(6) (1881) 6 P. D. 98.

(7) (1876) 1 P. D. 447, 451.

(8) [1897] P. 138.

separation was because no statute said that she could not. The same was equally true in the case of divorce. Contracting out is always permitted unless it is contrary to public policy : Halsbury's Laws of England, vol. vii., p. 404.

[LAWRENCE L.J. referred to *Goslin v. Clark*. (1)]

If the decision in the Court below were held to be right, the effect would be to bring the entire deed to an end.

Sir Walter Schwabe K.C. and *G. Tyndale* for the wife. At the time when the deed of separation was entered into, divorce could not have been within the contemplation of the parties. The wife covenanted not to sue for restitution of conjugal rights, and the wife's right to divorce for the single offence of adultery has only recently been conferred on her. It is suggested therefore that the word " maintenance " in the deed is used of the wife's right to support during the continuation of the marriage tie. But if this be not the correct construction of the covenant, still the wife's right to permanent maintenance is not barred. The Court has power under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, to allow maintenance in such cases as it thinks just ; and the parties cannot contract that the Court shall not have that power as between themselves. In *Bishop v. Bishop* (2) Lindley L.J., in giving the judgment of the Court of Appeal, said that the section of the Act relating to permanent maintenance (then s. 32 of the Matrimonial Causes Act, 1857) " is very wide indeed, and it would not be right for this or any Court to put a narrow construction upon it, or to fetter in any way the Court or judge intrusted with its application in cases of divorce." He went on to point out that the section said that regard was to be had to the wife's fortune, to the ability of the husband and to the conduct of the parties, and that it could not be right that these matters should be disregarded and attention paid only to the terms of the separation deed. And that is equally true in regard to s. 190 of the Act of 1925. It was the alteration in status on the breaking of the marriage tie that was recognized as preventing the wife's being bound by her

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

(1) (1862) 12 C. B. (N. S.) 681.

(2) [1897] P. 138, 164.

C. A. 1928 covenant: *Morrall v. Morrall* (1), the decision in which was mentioned without disapproval in *Gandy v. Gandy* (2) and *Bishop v. Bishop*. (3)

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

Again, if on its true construction the deed was intended to deprive the Court of the power to grant permanent maintenance after divorce, the agreement was contrary to public policy and void on this ground. That was suggested in *Bishop v. Bishop*. (3) If it was open to the wife in this Court, she would contend that *Gandy v. Gandy* (4) was wrongly decided, but it is unnecessary to go so far, as it is distinguishable.

[GREER L.J. In the second case of *Gandy v. Gandy* (5) it seemed to be suggested that rights besides those of the husband and wife could be considered by the Court.]

That is certainly so when there are children.

Lastly, it has been suggested that if the Court held that the wife's covenant did not bind her, then equally the deed of separation could not bind the husband. That question was not before the Court here on the trial of a preliminary issue only. But if it were, it is suggested that the true view is that the deed would stand except as regards the wife's covenant. The wife could, however, be restrained by the order of the Court from enforcing the allowance under the separation deed: *Reid v. Reid*. (6)

Grazebrook in reply. There has been no change in circumstances here, as in *Morrall v. Morrall* (1), where the existence of the incestuous adultery was only discovered after the covenant had been entered into. The existence of the adultery here was continuous before and after the separation. There was no ground for contending that "maintenance" in the deed of separation did not mean "permanent maintenance." The existence of the wife's covenant not to ask for maintenance did not amount to giving leave or licence to commit adultery.

Cur. adv. vult.

H. C. G

- (1) 6 P. D. 98.
(2) 7 P. D. 168, 175.
(3) [1897] P. 138, 164.

- (4) 7 P. D. 168.
(5) 30 Ch. D. 57.
(6) [1926] P. 1.

HUGHES v. HUGHES.

1928

Adjourned Summons.

By an indenture dated November 15, 1920, and entered into by way of compromise of a previous suit in Ireland for a divorce a mensa et thoro it was covenanted (inter alia) that L. G. Hughes, the wife, and G. E. Hughes, the husband, should live separate and apart and that the wife should not "commence or prosecute any action or other proceeding for compelling the husband to cohabit with her or to allow her any support maintenance or alimony."

The husband having become domiciled in England, the wife by a petition dated September 25, 1926, there prayed for a dissolution of her marriage on the ground of the adultery of the husband, and on May 4, 1927, a decree nisi was pronounced which was in due course made absolute. On November 15, 1927, the wife filed a petition for permanent maintenance. There were four children of the marriage. On January 6, 1928, the husband took out the present summons calling on the wife to show cause why further proceedings on the petition for permanent maintenance should not be stayed and the petition dismissed by reason of the wife being estopped from prosecuting the same by the covenant in the indenture of November 15, 1920.

There were affidavits on both sides as to various matters of fact which are immaterial to the question on which the case is reported, i.e., whether the covenant in question was an effective bar.

The registrar, who heard the summons, dismissed the petition for maintenance. The wife appealed to the judge in Chambers (Lord Merrivale P.), who adjourned it into Court.

Sir J. O'Connor K.C. (J. W. Morris with him) for the appellant. The jurisdiction in divorce now depends upon the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190, sub-s. 1, which gives power to the Court to order such a sum of money as it may deem to be reasonable. In cases of restitution of conjugal rights

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

1928
 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.

under s. 190, sub-s. 4, the amount is to be such as the "Court thinks just." The same adjective "just" is to be found in the alimony section of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 17, applying to cases other than that of dissolution. The difference of language is intentional; in dissolution the wife is no longer bound by matrimonial contract. Further, it would be contrary to public policy to hold otherwise. In *Bishop v. Bishop* (1) the President (Sir F. H. Jeune) quotes from Sir James Hannen in *Morrall v. Morrall* (2): "When she has established that her husband has been guilty of (incestuous) adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed. Circumstances may justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and amongst them to an allowance based upon her husband's actual income." There is nothing to fetter the Court in arriving at a reasonable sum. To contend otherwise is to fetter all the powers of the Court to provide for a wife and children in cases of dissolution, as pointed out by Lindley L.J. in the Court of Appeal in the same case: *Bishop v. Bishop*. (3) The only distinction between the present case and *Bishop v. Bishop* (1) is that in that case there was no covenant not to sue, but the parties to the covenant are not those to the suit. It was a wife who covenanted not to sue. She no longer has that character. She is now a stranger to the man. Hence the difference in language as to the character of the provision. It is to be "reasonable" in the case of strangers and "just" with those who are still spouses. A fresh order may be made and the petitioner restrained from enforcing the deed, as in *Reid v. Reid*. (4)

Clifford Mortimer (R. Ellis with him) for the respondent. The change in the status of the wife does not absolve her from the covenant. *Morrall v. Morrall* (2) is no authority. The ratio decidendi in that case, i.e., that the adultery of the husband per se disentitles him to rely upon the contract,

(1) [1897] P. 138, 141.
 (2) 6 P. D. 98.

(3) [1897] P. 138, 163, 164.
 (4) [1926] P. 1.

is no longer law after what was said by Jessel M.R. in *Gandy v. Gandy*. (1) *Besant v. Wood* (2) is an authority for the validity of the covenant. As pointed out in *Bosworthick v. Bosworthick* (3) the relative rights of husband and wife as to property have been completely altered since power to vary settlements was first conferred by the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5. The deed is not avoided by the decree: *Clifford v. Clifford*. (4) The suggestion on the other side is practically this, that the petitioner can avoid the covenant by her own act in setting up the adultery and obtaining the decree. There is no warranty in the wording of the statutes for interference with covenants. All that is authorized by them is the application of the settled property: per Lindley L.J. in *Bishop v. Bishop*. (5)

Sir J. O'Connor K.C. in reply. *Jump v. Jump* (6) shows the extended meaning of "settled property."

1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

Cur. adv. vult.

March 26. THE PRESIDENT (LORD MERRIVALE). The applicant was petitioner in a suit for dissolution of her marriage with the respondent, wherein a decree absolute of divorce was pronounced in November, 1927. Subsequently to the decree by a petition framed in accordance with the Judicature (Consolidation) Act, 1925, s. 190, she sought an order for permanent maintenance. This application was met by the respondent with an affidavit setting up an agreement under seal made between the parties in 1920 by way of compromise of an action then brought by the applicant whereby she covenanted that she would not thereafter commence or prosecute any action or other proceeding for compelling the respondent to allow her any support, maintenance, or alimony. The question now to be determined is whether the present petition of the applicant is maintainable by her notwithstanding her covenant.

(1) 7 P. D. 168, 172.

(2) 12 Ch. D. 605.

(3) [1926] P. 159, 163.

(4) (1884) 9 P. D. 76.

(5) [1897] P. 138, 165.

(6) (1883) 8 P. D. 159.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

The President.

For the respondent it was contended that the covenant, having been made for good consideration by a competent contracting party, ought to be enforced by the Court in the mode in which the provisions of agreements for separation made between husband and wife were enforced before the Judicature Act, 1875, and indeed after that statute was in operation, by Courts of equity; and that inasmuch as part of the consideration moving from the respondent was an assignment of property, the petitioner, while retaining this property, ought not to be heard upon an application for breach of the covenant. Stress was laid also upon the argument that except in so far as a post-nuptial settlement may be varied in this jurisdiction by application of the powers contained in the Judicature (Consolidation) Act, 1925, s. 192, the disposition of property effected by the deed in question is binding upon the parties, notwithstanding the change of their status effected by the dissolution of their marriage. Change of status, it was said, is immaterial. *Bishop v. Bishop* (1), which was relied upon for the applicant, was said not to cover the present case, inasmuch as there was not in that case a covenant not to sue. Counsel also met by anticipation the doubt which was expressed by the Court of Appeal in *Bishop v. Bishop* (1) as to the validity of any agreement during marriage not to sue for increased maintenance in the event of a subsequent divorce on the ground of adultery. This deed of compromise, it was truly said, was not made in contemplation of any proceeding for dissolution of marriage.

The matter last mentioned does not present the true ground on which, as it seems to me, the issue between the parties is to be dealt with. The deed in question was made by way of compromise of a suit for divorce a mensa et thoro in Ireland, the parties being at the time domiciled there. The marriage between them was incapable of dissolution under their then conditions, except by Act of Parliament. No doubt an express undertaking by a wife, in this country, that she would not sue her husband for maintenance if he

should be guilty of adultery would be held to taint with immorality a contract of which it should be found to have formed part. If adultery supervened and a petition for divorce was filed in respect of such adultery the bargain would be evidence of collusion. Whether an Irish petitioner for relief by Act of Parliament would have fared any better in times when the procedure upon petitions to Parliament by Irish applicants for divorce was settled, is a speculative inquiry, but inasmuch as the stringent provisions of the Matrimonial Causes Act, 1857, were largely founded on the practice upon bills for divorce, I think she would not. As I have said, however, the argument seems to me to have little practical relation to the facts of this case.

The decisive question here is whether the present applicant has covenanted not to do what she now seeks to do. In my opinion, she has not. She covenanted, as a wife, against making, as a wife, any claim upon her husband, as a husband, for support, maintenance or alimony, that is to say, she covenanted not to proceed in a Court having jurisdiction in such matters, to require as against her husband the provision for her livelihood for which in his marital capacity he would during their marriage *prima facie* be liable. She is not so proceeding. She is no longer a wife; but having been the wife of the respondent, she comes to the Court under a statute applicable to her present plight to ascertain whether the Court shall, under the circumstances of her case, deem it right that her some-time husband shall make her some pecuniary allowance.

It does not weaken the applicant's title to be heard under s. 190 of the Act of 1925 that in *Morrall v. Morrall* (1) Sir James Hannen held that a wife's covenant not to claim increased maintenance was released by the adultery of her husband established in a suit for divorce, or that in *Bishop v. Bishop* (2) in the Court of Appeal the Lords Justices appear not to have doubted that in a case for divorce this view would have been correct. The applicant is entitled to be heard on her petition. Objection which was made to her claim

(1) 6 P. D. 98.

(2) [1897] P. 138.

1928
 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.
 The President

1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

on the ground that the respondent purchased the covenant on which he relies by a grant of property, so far as it has weight, will be open for consideration when the Court proceeds to determine within the terms of the statute what payment, if any, having regard to the applicant's fortune, the ability of the respondent, and the conduct of the parties the Court shall deem to be reasonable.

R. M. M.

The husband appealed.

Clifford Mortimer and *R. Ellis* for the appellant. The wife's covenant not to sue for maintenance binds her after she has divorced her husband. It is said that this is not so, because of the existence of the statutory provisions for permanent maintenance after dissolution of marriage, as contrasted with the position arising upon a decree for judicial separation. This is explained by the fact that before the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), was passed, two remedies only for matrimonial offences were known—namely, divorce a mensa et thoro and restitution of conjugal rights. At that time too the right of the wife to alimony on divorce a mensa et thoro was well recognized. The Act of 1857 abolished divorce a mensa et thoro and introduced two new remedies: judicial separation and dissolution of marriage. As regards judicial separation, although it differed from divorce a mensa et thoro in certain respects, it sufficiently resembled it for the established practice to be applicable, and the right to alimony that arose was similar to that which had previously arisen upon a divorce a mensa et thoro. There was therefore no need of any guidance in the statute as to the principles applicable to it, and s. 17 of the Act merely provided that the Court might make any order for alimony that was just. Dissolution of marriage was an entirely new remedy, and it was necessary in providing for permanent maintenance to state what general matters should be taken into account in granting it: see s. 32 of that Act. This question of maintenance was further dealt with by the Matrimonial Causes Act,

1866 (29 Vict. c. 32), s. 1. The right to vary the trusts of settlements had previously been introduced by the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, and certainly did not give any power to set aside the wife's covenant not to sue for maintenance. In *Williams v. Baily* (1) it was recognized that a wife would be bound by her covenant not to apply for alimony pendente lite when she was applying for a decree of judicial separation. Provisions in deeds of separation were also held not to be put an end to by divorce: *Worsley v. Worsley* (2); *Charlesworth v. Holt*. (3) Again in *Besant v. Wood* (4) and *Marshall v. Marshall* (5) it was held that there was nothing illegal in a wife covenanting not to sue for restitution of conjugal rights.

It has been established that no covenant by a spouse in a deed of separation can limit the powers of the Court to make orders for the custody and maintenance of the children; and that if there has been what amounts to repudiation of the agreement on one side, the other side ceases to be bound. But with those limitations it is contended that a covenant in a deed of separation not to sue for alimony or maintenance remains binding notwithstanding the subsequent dissolution of the marriage. The cases in which such a covenant has seemed to be set aside are ill founded, and there is no reason based on public policy why the wife should not be held to a contract. A wife who divorces her husband is no more meritorious than a wife who obtains a decree for judicial separation, and there is no reason why she should be bound in the latter case and absolved in the former case from her covenant.

Turning to the authorities dealing more directly with this subject, the first three are *Benyon v. Benyon* (6); *Morrall v. Morrall* (7); and *Gandy v. Gandy* (8), in all of which Sir James Hannen applied the same course of reasoning and a course of reasoning that was wrong. It was that

C. A.

1928

 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.

(1) (1866) L. R. 2 Eq. 731.

(2) (1869) L. R. 1 P. & M. 648.

(3) L. R. 9 Ex. 38.

(4) 12 Ch. D. 605.

(5) 5 P. D. 19.

(6) 1 P. D. 447.

(7) 6 P. D. 98.

(8) 7 P. D. 77.

C. A. 1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

adultery caused a change of circumstances which freed the wife from her covenant. The Court of Appeal in *Gandy v. Gandy* (1) soon disposed of this reasoning. It is true that *Morrall v. Morrall* (2) was not then before the Court, but it is contended that the decision of the Court of Appeal in *Gandy v. Gandy* (1) cut away the ground of the decision in *Morrall v. Morrall*. (2) It was then sought by the Court of Appeal to justify the decision in *Morrall v. Morrall* (2) on another ground, as being based on the power to vary settlements. But the incorrectness of this is afterwards recognized in *Bishop v. Bishop*. (3) The second decision of the Court of Appeal in *Gandy v. Gandy* (4) that the wife could apply for maintenance notwithstanding her covenant was based on the view that the husband had himself repudiated it. In *Rose v. Rose* (5) the wife in a separation deed not only condoned past acts of the husband, but covenanted not to raise any of them in any future proceedings. That was contrary to the whole doctrine of condonation, which was always treated as conditional forgiveness, so that the offence revived on the commission of any further matrimonial offence. But the Court of Appeal held the wife to her covenant. *Clifford v. Clifford* (6) was a case of variation of the trusts of a deed of separation as regards the sum payable to a guilty wife under it. *Wilkinson v. Wilkinson* (7) closely resembles *Bishop v. Bishop* (3), and both are distinguishable on the ground that there was not in either case a covenant not to sue for maintenance. The Court never considered in those cases the effect of a covenant against having recourse to the Court. There is no ground on the authorities for saying that the wife is freed of her covenant. Nor could it be said that the continuance of the covenant is contrary to public policy. The wife could covenant not to sue for restitution of conjugal rights; how then could it be said that a covenant not to sue for maintenance was against public policy?

(1) 7 P. D. 168.

(2) 6 P. D. 98.

(3) [1897] P. 138, 165.

(4) 30 Ch. D. 57.

(5) (1883) 8 P. D. 98.

(6) 9 P. D. 76.

(7) (1893) 69 L. T. 459.

Sir J. O'Connor K.C. and *J. W. Morris* for the wife. It is possible to condone past but not future matrimonial offences. Thus no agreement could oust the jurisdiction of the Court so far as decrees for judicial separation and divorce were concerned. It is suggested that though this is true, an agreement between the parties can oust most of the immediate consequences. How can that be possible? Indeed it scarcely accords with what was said in *Bishop v. Bishop* (1) or *Gandy v. Gandy*. (2) A covenant not to sue for damages in the case of misconduct giving rise to divorce is bad. If the covenant was two-fold, first, not to sue for alimony or maintenance if there are no such future proceedings, and secondly, not to sue for alimony or maintenance if there are future proceedings. The first would be good in law and the second bad. Here it is a covenant not to sue in any event; how can this have any more value after proceedings for divorce? In *Baddeley v. Earl Granville* (3) it was pointed out that "an obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it." Here s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, is punitive in effect. The first decision of the Court of Appeal in *Gandy v. Gandy* (4) is wrong and does not accord with the second decision. (2) Further the Court of Appeal is not bound by its previous decision: *Webster v. Ashton-under-Lyne Overseers*. (5) But even if *Gandy v. Gandy* (4) is to be treated as binding it is distinguishable as having been treated as a case when there had been no change of status. In *Gandy v. Gandy* (2) the husband never repudiated the deed, but he claimed not to be bound by his covenant. He had however previously allowed the Court to consider he was bound. (4) Afterwards when he claimed not to be the wife was sent back to the Probate Division to get alimony. There is no substantial difference between *Bishop v. Bishop* (6) and the present case. The right of the

O. A.
1928
—
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

(1) [1897] P. 138, 166.

(2) 30 Ch. D. 57.

(3) (1887) 19 Q. B. D. 423, 426.

(4) 7 P. D. 168.

(5) (1873) L. R. 8 C. P. 306, 313.

(6) [1897] P. 138.

C. A. 1928
 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.

Court to vary settlements under s. 192 of the Act of 1925 is very wide. A covenant to pay by the husband is settled property which could be dealt with by the Court under this section, and if so there must be a correlative right to release the wife from her covenant.

[LORD HANWORTH M.R. In *Bosworthick v. Bosworthick* (1) the Court of Appeal treated a wife's bond securing an annuity to her husband as settled property.]

Again the wife's covenant not to have recourse to the Court for maintenance was against public policy: *In re Hope-Johnstone*. (2) In that case the authorities were collected and discussed, which showed in principle that if the covenant in question in the case had expressly referred to a future divorce, it would have been void. If so, the covenant must be void in so far as the position after divorce was concerned.

Mortimer in reply. The husband's case admittedly rests largely on *Gandy v. Gandy* (3) having been rightly decided when first before the Court of Appeal. The Court ought not to depart from that decision, as it had stood unquestioned for over forty years. While that decision stands it is impossible to say that the wife's covenant was contrary to public policy.

Cur. adv. vult.

June 18. LORD HANWORTH M.R. The case of *Hyman v. Hyman* comes before this Court on appeal from an order of Hill J. made on March 27, 1928, on a preliminary issue which had been directed to be tried, the question being whether or not the petition by the wife for permanent maintenance on the dissolution of her marriage ought to be dismissed on the ground that any such proceedings taken by the wife are a breach of a covenant on her part not to endeavour to compel her husband to allow her alimony beyond the sum provided in a deed of separation entered into between the spouses on September 20, 1919. Hill J. decided that the petitioner was not precluded from

(1) [1927] P. 64.

(2) [1904] 1 Ch. 470, 474.

(3) 7 P. D. 168.

prosecuting her claim. In coming to this decision he relied upon the decision given by the President on the previous day in the case of *Hughes v. Hughes*. This appeal is prosecuted in order to bring that decision to the consideration of this Court.

In the case of *Hughes v. Hughes* an appeal was entered from the decision of the President already referred to, which had determined that the petitioner was at liberty to proceed in her petition for maintenance, and we have taken steps to hear that appeal before giving the decision of the Court in *Hyman v. Hyman*. This judgment will therefore deal with both appeals. The case being one of difficulty and importance has been reargued before the full Court. It is necessary to state the facts in each separately, for there are some differences that may be important.

HYMAN v. HYMAN.

The marriage took place on September 14, 1912. There were no children of the marriage. In 1919 differences arose between the husband and the wife, and on September 20, 1919, a deed of separation was entered into whereby the husband “for himself his executors and administrators” agreed to pay his wife immediately two lump sums which do not concern this case and covenanted “during the life of the said May Hyman to pay or cause to be paid to the said May Hyman . . . the weekly sum of 20*l.* free of income tax on the Monday of every week without any deduction whatsoever for her separate use and benefit and for her maintenance.” The wife covenanted “that she would not molest or disturb the said Maurice Percy Hyman by any means either by taking out citation or process or by instituting any action in England or elsewhere or in any other manner compel the said Maurice Percy Hyman to cohabit with the said May Hyman or endeavour to enforce any restitution of conjugal rights or to compel the said Maurice Percy Hyman to allow her any alimony or maintenance further than the said weekly sum of 20*l.*,” and the lump sums already mentioned.

On January 11, 1926, the wife presented a petition praying for the dissolution of the marriage on the ground of her husband’s adultery. This charge was admitted, and on

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lord Hanworth
M.R.

C. A. January 25, 1927, a decree nisi was pronounced. On
 1928 February 7, 1927, the wife presented a petition for permanent
 maintenance under s. 190 of the Supreme Court of Judicature
 (Consolidation) Act, 1925, and alleged in the petition that
 the respondent was possessed of large means. In his answer,
 the respondent relied upon the covenant not to take proceed-
 ings to compel him to allow her alimony above set out, and
 after some steps in the proceedings, the order was made
 on October 31, 1927, directing the preliminary issue to be
 tried and staying meanwhile all further proceedings on the
 question of maintenance. The hearing of the issue was begun
 before Hill J. on February 10, but his decision was not given
 until March 27, immediately after the President's decision
 in *Hughes v. Hughes*, and in the meantime, on February 27,
 1928, the decree nisi had been made absolute.

HUGHES v. HUGHES.

The spouses were married on June 8, 1892, in Ireland, where the husband was then domiciled. On July 22, 1903, the wife presented a petition in the Irish Court for divorce a mensa et thoro, and on June 8, 1904, the proceedings were compromised and determined by an agreement entered into between the husband and the wife, whereby the parties agreed to live separate and apart, and the husband agreed to pay the wife 50*l.* a year during her life by half-yearly payments, and charged 25*l.* part of this annuity upon a house and premises at Dalkey in the county of Dublin; and the wife covenanted "not to commence or prosecute any action or other proceeding for compelling the said G. E. Hughes to cohabit with her or to allow her any support, maintenance or alimony except the said annual sum of 50*l.*"

On February 14, 1920, the wife presented a second petition for divorce a mensa et thoro in the Irish Court which was compromised and determined by a deed executed on November 15, 1920. The terms—which were carried into effect—were that the husband was to assign the house and premises at Dalkey to his wife absolutely, and the wife released the husband from the payment of the annuity of

50*l.*, and also covenanted that she would not commence or prosecute any action or other proceeding "for compelling the said G. E. Hughes to cohabit with her or to allow her any support, maintenance or alimony."

In 1922 the husband left Ireland and acquired a domicile in England; and on September 25, 1926, the wife presented a petition for divorce in the English Court for dissolution of the marriage on the ground of adultery committed since 1923. This petition was heard on May 4, 1927. There was no defence, and a decree nisi was granted which was made absolute on November 14, 1927.

On November 15, 1927, a petition for permanent maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, was presented by the wife. Thereupon a summons was taken out on the part of the husband to dismiss the petition on the ground that its presentation was prevented by the covenant contained in the deed of November 15, 1920. The registrar held in favour of the husband and dismissed the petition for maintenance. The wife appealed, and on March 26, in a considered judgment, the President reversed the decision of the registrar and held that the petitioner was at liberty to proceed on her petition. From this judgment the husband now appeals to this Court.

In both cases, therefore, the proceedings to obtain an order for permanent alimony have been taken under s. 190 already referred to in defiance of a covenant not to institute proceedings to compel the husband to allow the wife any alimony or maintenance otherwise than had already been provided; and in neither case is any misconduct, or breach of the terms of the covenants entered into on his part, charged against the husband.

The question to be determined is whether such a covenant in a deed of separation against taking further proceedings for maintenance or permanent alimony binds an innocent wife when by the means of subsequent proceedings the marriage has been dissolved by decree absolute.

The judgment of the learned President appears to take note of the particular circumstances under which the covenant

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lord Hanworth
M.R.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lord Hanworth
M.R.

of the wife in *Hughes v. Hughes* came to be entered into. It was in a deed compromising a suit for divorce a mensa et thoro, entered into between parties who were domiciled in Ireland, where there is no procedure leading to a divorce a vinculo through the means of the Law Courts, and where if a divorce is to be obtained, it must be through the means that prevailed in England before the Act of 1857 was passed—namely, by an Act of Parliament. He held therefore that no covenant in such a deed could have contemplated the complete severance of the relation of husband and wife as has now supervened, and that the wife cannot be held to have covenanted not to do what she now seeks to do. He holds that by such a covenant she is not debarred from seeking relief “under a statute applicable to her present plight” not contemplated previously. He adds that in his opinion if there were an express undertaking by a wife in this country that she would not sue her husband for maintenance, such a bargain would be evidence of collusion if he should be guilty of subsequent adultery; and, looking forward, I think he expresses an intention that he would not enforce it against her. The comment, however, appears to me to remain good—that the basis of the decision in the case of *Hughes v. Hughes* does not cover that of *Hyman v. Hyman*, where the difference between the law as to divorce in England and Ireland is not relevant.

In reviewing the cases which have been cited to us in the argument, it is not unimportant to note that agreements providing for the prospective separation of the spouses have been held consistently to be invalid. See *Marquess of Westmeath v. Marquess of Salisbury* (1); *Cartwright v. Cartwright* (2); *In re Hope-Johnstone* (3); *Harrison v. Harrison*. (4) The principle of these decisions appears to be that provision for the disruption of the association in married life ought to be discouraged. But a deed of separation entered into at the time when the separation takes place, and regulating the terms on which the spouses are to live apart, is good. See

(1) (1830) 5 Bli. N. R. 339. (3) [1904] 1 Ch. 470.
(2) (1853) 3 D. M. & G. 982, 989. (4) [1910] 1 K. B. 35, 40.

the judgment of Lord Westbury in *Hunt v. Hunt* (1), following *Wilson v. Wilson* (2), where a covenant by a husband that he would not compel his wife to cohabit or live with him was enforced, and an injunction granted to prevent the husband continuing proceedings for the restitution of conjugal rights.

In *Marshall v. Marshall* (3) a wife was held bound by her covenant not to sue her husband for restitution of conjugal rights contained in a deed of separation, and a suit instituted by her in breach of her covenant was dismissed. Sir James Hannen followed *Hunt v. Hunt* (1), and applied it to prevent a wife from taking proceedings. In *Besant v. Wood* (4), which was decided shortly after *Marshall v. Marshall* (3) (which is referred to in it), Sir George Jessel took the same course, and also held that the husband was not disabled from enforcing the covenant of his wife by reason of trifling breaches of covenant on his part.

The recognition of covenants in deeds of separation was carried to a high point in *Charlesworth v. Holt* (5), where the Court of Exchequer enforced a covenant on the part of a husband to pay an annuity for his wife's support "during their joint lives and so long as they should live separate and apart" notwithstanding that the marriage had been dissolved subsequently in consequence of the wife's adultery. The Court construed the covenant as absolute in its terms. There were no terms limiting the liability to the period during which the marriage remained undissolved. It is to be observed, however, that the action in that case was brought by the trustees with whom the covenant was entered into and who brought their action for non-payment to them. The plea setting forth the wife's adultery, and the dissolution of the marriage in consequence of it, was held bad as affording no answer to the action by the trustees, for the liability of the husband was not limited by the terms of the deed to the duration of the marriage tie. It was thus held that his liability to the trustees was not determined. Whether that

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lord Hanworth
M.B.

(1) (1862) 4 D. F. & J. 221.

(3) 5 P. D. 19.

(2) (1854) 5 H. L. C. 40.

(4) 12 Ch. D. 605.

(5) L. R. 9 Ex. 38.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lord Hanworth
M.R.

case would be, or ought to be, now decided in the same way appears to me to be open to grave question. It was decided in 1873, some fifteen years after the Matrimonial Causes Act came into operation, and the decision appears to conflict with more recent decisions.

Three cases which involved the question as to the effect of a deed of separation upon the rights of the spouses to apply for permanent alimony came before Sir James Hannen at short intervals of time, and in all of them he decided that the deed did not prevent an order for permanent maintenance being made on the usual basis. In *Benyon v. Benyon* (1) the petitioner, who was the husband, had accepted a covenant by his wife in the deed of separation between them, dated December 30, 1872, to pay to him 100*l.* a year. Afterwards the marriage was dissolved by a decree made absolute on July 31, 1874, and on December 2, 1874, the husband petitioned the Court for an order for a larger payment out of his wife's income under 22 & 23 Vict. c. 61, s. 5, which is now replaced by s. 192. Sir J. Hannen decided that he was to be paid out of his wife's income 300*l.* per annum for his life. The objection was taken that after a sum had been fixed for his maintenance, the husband was not at liberty to come to the Court and ask for a variation of the settlement and payment of an increased sum. The learned judge overruled that objection on grounds which he affirmed later in his careful judgment in *Gandy v. Gandy* (2), and relied upon the change of conditions between the time when husband and wife live apart under the agreement, and the time when they are no longer husband and wife. It is true that there was no covenant by the husband in *Benyon v. Benyon* (1) not to take proceedings to compel an allowance of a larger sum, but there was such a covenant in *Gandy v. Gandy* (2), and Sir James Hannen decided the latter case and followed his previous decision in *Benyon v. Benyon* (1), on reasoning which does not lay stress upon the presence or absence of such a covenant. The next case, *Morrall v. Morrall* (3),

(1) 1 P. D. 447.

(2) 7 P. D. 77.

(3) 6 P. D. 98, 100.

was decided in 1881. The wife had covenanted in a deed of separation to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance. Afterwards the marriage was dissolved on the ground of the husband's adultery. I have had the papers in that case brought from the Registry, as the report of the case is incomplete in some particulars. The adultery was committed with the wife's niece and so was "incestuous," giving the wife a right under s. 27 of the Act of 1857, to seek relief upon the ground of that adultery alone. The deed of separation was dated August 1, 1879, and the adultery charged was subsequent to the deed—in the later part of August and in the following months. There were however no facts which rendered the case peculiar as to the husband's misconduct, save only that the adultery was committed with a woman within the prohibited degrees of consanguinity or affinity to the husband. Sir James Hannen held that the wife was entitled to the usual order for maintenance in spite of her covenant in the deed, because a state of things arose "not in contemplation when the deed was executed, and the wife is not restrained by the deed. . . . Circumstances now justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit."

Then came *Gandy v. Gandy* (1), (1882), where there was a separation on the terms of a deed, and a covenant in it by the wife not to take proceedings for a larger allowance of alimony than that provided by the deed. The husband subsequently committed adultery and the wife obtained a decree for judicial separation and asked for increased alimony. Sir J. Hannen applied his observations in *Benyon v. Benyon* (2) *mutatis mutandis* to the case before him—namely, that the considerations which may have led to the acceptance of a smaller sum in a deed of separation did not disentitle the spouse to proceed to enforce a larger claim based upon new circumstances not contemplated when the deed was entered into. And he adds (3): "I held in *Morrall v. Morrall* (4)

C. A.

1928

HYMAN

v.
HYMAN.

HUGHES

HUGHES.

Lord Hanworth
■M.R. j

(1) 7 P. D. 77.

(2) 1 P. D. 447.

(3) 7 P. D. 77, 82.

(4) 6 P. D. 98.

C. A.
1928

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

Lord Hanworth
M.R.

that the deed was executed on the basis of the facts which existed at its date, and that the subsequent adultery of the respondent created a different state of facts, which was not in contemplation of the parties when entering into the deed, and that therefore the petitioner was no longer bound by it." This judgment was reversed in the Court of Appeal. (1) In the judgments, attention is called to the fact that the decree of the Court was for a judicial separation, based, no doubt, on the husband's adultery after the separation deed had been entered into, but the decree was for a judicial separation and not for the dissolution of the marriage. Lindley L.J. propounded the question before the Court as being whether there had been any sufficient reasons given for holding the wife discharged from her covenant not to sue for further alimony. Further, he added (1): "This being only a suit for judicial separation, the power of the Divorce Court over these deeds is much less than it would be after a decree for dissolution of marriage. It is a much more restricted jurisdiction and power, and it appears to me that the cases, of which *Morrall v. Morrall* (2) is one, where the Divorce Court has dealt with separation deeds after decrees for dissolution of marriage, are rather misleading, when they are applied, or sought to be applied, in a case where the Court has no such extensive jurisdiction."

It must be observed that although *Morrall v. Morrall* (2) is thus referred to, no suggestion is made that it was wrongly decided. The Lord Justice holds that it is not pertinent to a case of judicial separation. No comment is made that the reasoning of Sir James Hannen was wrong when he held in the passage I have already quoted, that a different state of facts arose out of the subsequent adultery of the husband over which the separation deed exercised no restrictive power. I note that observations to the same effect as to the attitude of the Court of Appeal in *Morrall v. Morrall* (2) were made by Sir Francis Jeune in *Bishop v. Bishop*. (3)

In *Wilkinson v. Wilkinson* (4), decided in 1893, Sir F. Jeune made an order for permanent maintenance and neglected a

(1) 7 P. D. 168, 175.

(3) [1897] P. 138, 144, 145.

(2) 6 P. D. 98.

(4) 69 L. T. 459.

term in a deed on the same ground as expressed in *Morrall v. Morrall* (1) that the wife was entitled to what follows from divorce.

I come now to the cases of *Bishop v. Bishop* (2) and *Judkins v. Judkins* (2), but I may by way of preface say that I do not think that ss. 191 and 192 of the Judicature (Consolidation) Act, 1925, replacing the similar sections in the previous Acts, touch the present question or afford any solution to it. The argument that the principle of these restrictive agreements is "contrary to public policy" does not weigh with me for the reasons given by Sir George Jessel M.R. in *Gandy v. Gandy* (3), and there is much force in the observations made by counsel that public policy requires that contracts should be kept and covenants fulfilled.

In *Bishop v. Bishop* (2) there was an agreement made between the parties on March 20, 1894, at the time when a petition by the wife for dissolution of the marriage was by consent dismissed, whereby the wife "agreed to accept 130*l.* by way of permanent maintenance. . . . This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved." There was no express covenant not to take proceedings to compel payment of any further sum for maintenance. Afterwards, in 1895, a petition was presented by the wife for the dissolution of the marriage on the ground of later adultery and desertion, and on November 19, 1895, she was granted a decree nisi which was made absolute on June 8, 1896. Thereafter she presented a petition for permanent maintenance to which the husband made answer by pleading the agreement of March, 1894. The registrar reported that the agreement was a bar to the petition, and the matter came before Sir Francis Jeune, by way of appeal, on a motion to vary the report.

The cases which I have dealt with were discussed. The President pointed out (4) that the reasoning on which *Gandy v. Gandy* (5) turned in the Court of Appeal "was

C. A.
1928

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
—
Lord Hanworth
M.R.

(1) 6 P. D. 98.

(3) 7 P. D. 168, 172.

(2) [1897] P. 138, 144, 145.

(4) [1897] P. 138, 144, 149.

(5) 7 P. D. 168.

C. A. the difference between the power of the Court in judicial
 1928 separation and in dissolution of marriage," and added that
 HYMAN in his opinion the decision in *Gandy v. Gandy* (1) "appeared
 v. not to reverse but to approve the decision in *Morrall v.*
 HYMAN. *Morrall*." (2) He therefore held that the Court could set
 HUGHES aside any previous agreement between the parties and do
 v. complete justice between them in the matter, and ordered the
 HUGHES. inquiry as to the husband's means to proceed.
 Lord Hanworth
 M.R.

Judkins v. Judkins (3) came before Gorell Barnes J. In that case there was a separation deed made on July 30, 1892, under which the husband agreed to pay the wife a yearly sum of 150*l.*, in addition to the sum to which she was entitled under her marriage settlement, and sums for the maintenance of the children of the marriage; but it did not contain any express covenant by the wife not to sue the husband for any further allowance or alimony than the 150*l.* a year. In 1896 the wife obtained a decree for judicial separation on the ground of the adultery of the husband subsequent to the deed; and upon the refusal by the registrar of an application for permanent alimony and maintenance for the children of the marriage because of the terms of the deed, the matter came before the judge. The case was one of judicial separation only, and not, as in *Bishop v. Bishop* (4), of divorce. Gorell Barnes J. reviewed the authorities and considered the effect of *Morrall v. Morrall* (2) and *Gandy v. Gandy* (1), but even though the case was one of judicial separation only, he decided that he was not bound by *Gandy v. Gandy* (1), and ordered the petition to proceed. His judgment turned in part on the absence of any covenant by the wife restraining her from seeking increased alimony, but his judgment cannot be put aside entirely upon that distinction, for he examines the authorities carefully and incidentally calls attention to *Tress v. Tress* (5), where Hannen J. is reported to have said that the authority of *Gandy v. Gandy* (1) was much shaken by what occurred when it came before the Court of Appeal

(1) 7 P. D. 168.

(3) [1897] P. 138, 144, 149.

(2) 6 P. D. 93.

(4) [1897] P. 138.

(5) 12 P. D. 128.

the second time. (1) The basis of the first judgment in *Gandy v. Gandy* (2) is explained by Bowen L.J. when it was before the Court of Appeal on the second occasion (1) in terms which make the case of little authority or assistance in the cases now before the Court.

In the Court of Appeal it was argued in both cases that a new state of facts had arisen, since the agreements of separation had been entered into. In *Bishop v. Bishop* (3) the wife obtained a decree for dissolution of the marriage, and in *Judkins v. Judkins* (3) a decree for a judicial separation had been made. All the cases were cited and considered. Lindley L.J. delivered the written judgment of the Court, which included A. L. Smith and Rigby L.JJ. The two appeals in *Gandy v. Gandy* (4) were reconciled; the later decision being justified by the new state of facts which had arisen in the course of the three years which had elapsed since the earlier decision, during which an order had been made giving the custody of the two youngest daughters to the wife, and the husband refused to support them. Lindley L.J. said it was very important to consider whether the Divorce Court had decreed a judicial separation or a dissolution of marriage, and in his summary of the effect of the first decision of *Gandy v. Gandy* (4) stated expressly that: "nothing was decided respecting any of the statutory powers of the Divorce Court in suits for dissolution of marriage," and laid it down (5) that *Bishop v. Bishop* (5) "must turn on the power of the Divorce Court on a dissolution of marriage to compel a husband to provide for his divorced wife, and to make orders for the maintenance and education of the children." He then proceeds to consider the relevant sections of the statutes, and particularly the provisions now embodied in s. 190 of the Judicature (Consolidation) Act, 1925. He definitely rejected the argument on behalf of the husband "that all these matters—[the powers of the Court]—are to be disregarded and attention is only to be paid to the terms of the separation

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lord Hanworth
M.R.

(1) 30 Ch. D. 57, 81.

(3) [1897] P. 138, 149.

(2) 7 P. D. 168.

(4) 7 P. D. 168; 30 Ch. D. 57.

(5) [1897] P. 138, 163, 165.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
—
Lord Hanworth
M.R.

deed.” “This cannot be right” is the unequivocal statement of the Court, to which is added: “The foregoing statutory powers amply justify the order under appeal,” and so, on the ground “that the statutory powers to which we have referred are ample to justify the order appealed from,” the appeal in *Bishop v. Bishop* (1) was dismissed.

The appeal in *Judkins v. Judkins* (2) was likewise dismissed, but that case did not involve considerations so germane to the one before us, as did *Bishop v. Bishop*. (2) I read this judgment, which is binding upon this Court, as explaining and limiting the effect of *Gandy v. Gandy* (3) and pronouncing in clear terms that the statutory powers of the Court are not fettered by a covenant in an agreement for separation. *Morrall v. Morrall* (4), which was brought to the attention of the Court, was not only not dissented from, but in effect approved.

Just as an agreement between husband and wife providing for a future separation has been held void, so also it is not possible by a covenant in a deed of separation to bar a suit for judicial separation or for divorce. The Court is charged under the original Acts, and the Consolidation Act, to be satisfied in divorce suits that the case has been proved, that there has not been connivance or collusion for the purpose of obtaining a divorce “contrary to the justice of the case,” that there has not been condonation, and that its interference is justified: see the historical survey of its jurisdiction given in *Churchward v. Churchward*. (5) The Court cannot forego its duties, and it cannot be bound by an estoppel between the parties: “for the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied”: see *Harriman v. Harriman* (6), per Lord Cozens-Hardy M.R., and also per Kennedy L.J.

(1) [1897] P. 138, 163, 165.

(2) [1897] P. 138, 149.

(3) 7 P. D. 168.

(4) 6 P. D. 98.

(5) [1895] P. 7.

(6) [1909] P. 123, 131, 132, 156.

By parity of reasoning, a provision or stipulation attempting to shorten the arm of the Court to exercise its statutory powers by means of a covenant in a separation deed, when subsequently a marriage is dissolved, by a decree absolute, is also ineffective. As Sir James Hannen said in *Morrall v. Morrall* (1) the successful spouse is entitled to all the incidents of the suit and the Court will not allow its powers to be prevented.

The result is that upon a decree being made absolute for the dissolution of the marriage, the effect of the deed of separation is gone, for the reasons stated by Gorell Barnes J. in *Judkins v. Judkins* (2), that "the parties are no longer living apart by agreement, but by the decree of the Court." Thus the wife is released from her restrictive covenant, and can proceed in the usual way to have decided what sum she is to receive from her husband for permanent maintenance. What he is to pay must be determined according to what is "deemed to be reasonable" by the Divorce Court under s. 190, and the terms of the deed as to the sum agreed for maintenance may be considered in reaching a decision as to what sum he should be ordered to pay, for the Court is to have regard not only to the ability of her husband, but also to the conduct of the parties, in deeming what is reasonable. It is unnecessary and premature at the present stage to decide whether any term should be imposed upon the wife, as was done in *Reid v. Reid*. (3)

For these reasons I am of opinion that both appeals should be dismissed with costs.

SCRUTTON L.J. These two cases raise an important question as to the powers of the Divorce Court to grant maintenance after a decree absolute for divorce. Sect. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, reproducing earlier statutes, provides that the Court may, if it thinks fit, on any decree for divorce secure to the wife such a gross or annual sum, or monthly or weekly

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lord Hanworth
M.R.

(1) 6 P. D. 98.

(2) [1897] P. 138, 149, 156.

(3) [1926] P. 1.

C. A. payment, as it thinks reasonable, having regard to the wife's
 1928 fortune, the ability of the husband and the conduct of the
 HYMAN parties. Sect. 192 empowers the Court, where there are
 v. settlements, to vary the application of the property settled
 HYMAN. for the benefit of the children of the marriage or the parties
 HUGHES thereto. Sect. 193 enables the Court, in any proceeding for
 v. divorce, to make monetary provision for the children of the
 HUGHES. marriage.
 Scrutton L.J.

The question intended to be raised by these appeals is whether it is a sufficient ground, without any further inquiry into the circumstances, to stop the Court from exercising its statutory powers as to grants of maintenance after a decree absolute for divorce, to prove a contract in a separation deed between husband and wife for good consideration that the wife shall not in future make any application for maintenance in addition to, or in substitution for the provisions, if any, contained in the agreement. The Court in these proceedings is not deciding what effect, if any, the Divorce Court should give to the previous agreement, when it comes to consider what order for maintenance, if any, it should make, after considering all the circumstances of the case, including the previous agreement. Nor is the Court considering, if it grants maintenance, whether it should make any order as to the continued validity of the deed of separation, as was done in *Reid v. Reid*. (1) The question is simply: does the contract in the separation deed not to take any further proceedings for maintenance, in itself and without more inquiry bar the Court from hearing an application for maintenance after a decree for divorce, based on adultery subsequent to the separation deed?

I approach the matter from the point of view of the statutory authority of the Court, not from the private agreement of the parties. The Divorce Court is entrusted with a jurisdiction of national importance. The stability of the marriage tie, and the terms on which it should be dissolved, involve far wider considerations than the will or consent of the parties to the marriage. The Court does

(1) [1926] P. 1.

not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties; nor does it readily act on uncorroborated confessions. When the full Court of Appeal in *Harriman v. Harriman* (1) discussed the effect of estoppel of the parties on the jurisdiction of the Court, Lord Cozens-Hardy said: "The jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied": see Fletcher Moulton L.J. (2) and Farwell L.J. (3) In the King's Bench Division, if default is made in delivering defence, the plaintiff is entitled to judgment on the allegations in the statement of claim, which are taken to be admitted without proof. In the Divorce Division the petitioner must prove his case, though the respondent does not defend. Many agreements between husband and wife will not be recognized as being contrary to public policy. An agreement to separate in three years' time; an agreement not to take divorce proceedings for future adultery, will not be enforced or recognized by the Court. Collusive or condoned adultery will not be a foundation for a petition for divorce. The alteration of the status of marriage involves considerations far beyond the private agreement of the parties. I entirely agree with the judgment of the Court of Appeal in *Bishop v. Bishop* and *Judkins v. Judkins* (4), where it is said: "As regards permanent maintenance, s. 32 of the Act of 1857 is very wide indeed, and it would not be right for this or any Court to put a narrow construction upon it, or to fetter in any way the Court or judge entrusted with its application in cases of divorce. The section says that regard is to be had to the wife's fortune, to the ability of the husband, and to the conduct of the parties. The appellant contends that all these matters are to be disregarded, and attention is only to be paid to the terms of the separation deed. This cannot be right."

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Scrutton L.J.

(1) [1909] P. 123, 131.

(2) Ibid. 142.

(3) [1909] P. 144.

(4) [1897] P. 138, 164.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Scrutton L.J.

A similar instance of the way in which the Court deals with private agreements affecting its jurisdiction is to be found in its attitude to arbitration clauses. Parties agree to refer all their disputes to arbitration in an agreed form. In breach of this agreement one party, instead of concurring in an arbitration, issues a writ. The Courts do not allow the private agreement to oust their jurisdiction, but consider in the light of all the circumstances, including the agreement of the parties and the importance of maintaining agreements, how the dispute can best be disposed of, and either stay or do not stay the action according to their views on the point. *Scott v. Avery* (1) cases are only an apparent exception, for, as explained in *Board of Trade v. Cayzer, Irvine & Co.* (2), the parties have agreed that, until agreed arbitrators have given a decision, there shall be no cause of action, and no action shall lie in any Court whatever. This is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatever, and no cause of action accrues, until arbitrators have given their decision.

Now it is agreed in the present case that there is no agreement of the parties which does or could stop the wife from asking for divorce in respect of adultery subsequent to the date of the separation deed. The Court has then full jurisdiction to dissolve the marriage. Dissolving the marriage, the Court has then the statutory power and duty of providing, at the expense of the adulterous husband, such maintenance for the woman who ceases to be a wife, and the children who have no longer a married couple to depend on, as the Court thinks proper after considering all the circumstances. If the private agreement of the parties before the adultery complained of cannot stop the proceedings for divorce, I do not understand how it, without more, can stop the incidental but necessary consequences of divorce, proper maintenance for the wife and children. Assume a separation agreement with no provision for payment to the wife, but a covenant that under no circumstances shall she apply for maintenance, I do not understand on principle how the mere fact prevents

(1) (1856) 5 H. L. C. 811.

(2) [1927] A. C. 610, 617.

the Court from exercising its statutory power. Indeed it is agreed that it cannot stop an application for maintenance for the children who have not contracted, even though the application is made by the wife who has contracted ; and even though she has contracted not to ask for maintenance for the children. On principle, therefore, I should decide that the jurisdiction of the Court to grant proper maintenance is not excluded by the mere fact that the parties have made an agreement before the adultery complained of, that the wife shall not apply for maintenance.

The authorities, such as they are, were discussed at great length before us. Four Presidents of the Divorce Division have for varying reasons all taken the view that in a case of divorce the agreement of the parties before the adultery complained of not to apply for maintenance is not enough in itself to stop the Courts granting maintenance under their statutory power. Sir James Hannen in *Benyon v. Benyon* (1) grounds his view on the change of circumstances. In *Morrall v. Morrall* (2) he rests on two matters: "A state of things . . . not in contemplation when the deed was executed," and that the grant of maintenance is incidental to a successful suit for dissolution of marriage, which she is entitled to bring: see also *Brown v. Brown*. (3) This latter view seems to me a very cogent argument. I deal with the earlier view later. Sir Francis Jeune in *Bishop v. Bishop* (4), where there was a covenant in the deed for maintenance to the wife, whether before or after dissolution of marriage, and a judicial separation ordered for subsequent adultery, granted maintenance partly on the ground of power to vary settlements, partly on the ground of public policy, partly on the ground that a child was not fully provided for. As stated later, this decision was affirmed by the Court of Appeal. Barnes J., afterwards President, in *Judkins v. Judkins* (4), granted maintenance in a case of judicial separation after a separation deed providing for payments for maintenance, but with no covenant not to sue for further

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Scrutton L.J.

(1) 1 P. D. 447, 451.

(2) 6 P. D. 98, 100.

(3) (1874) L. R. 3 P. & M. 202.

(4) [1897] P. 138, 141, 149, 151.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Scrutton L.J.

alimony, and ordered an increase of alimony after considering all the previous authorities. Lastly, Lord Merrivale, in the present case of *Hughes v. Hughes*, where the wife has received a house under a deed of separation and has covenanted not to sue for further maintenance, but has obtained a divorce for adultery subsequent to the separation, has granted the wife further maintenance. He has done so, as I understand, on the ground that the wife's covenant only applied while she was a wife, and ceased to operate when she was a divorced woman through the acts of her husband. It was said that this was contrary to *Charlesworth v. Holt* (1) decided in 1873, where it was held that in the absence of express words, the husband's obligation in a separation deed to pay maintenance was not discharged by the dissolution of the marriage through the wife's adultery. It is not necessary to decide it, but since 1873 the doctrine of termination of the obligations of a contract by the destruction of some state of things which was a fundamental though implied condition of the contract has been much extended. It is enough to refer to the Coronation cases (2), and to the discussion of the whole matter in *Metropolitan Water Board v. Dick Kerr & Co.* (3): see also the case in the Court below. (4) *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* (5) was cited to us for the views of Lord Parker; but I think counsel had not followed its subsequent history, and the curious position of the judgments therein, the real majority of the Court being opposed to Lord Parker's views of the law (see Scrutton on Charters, 12th ed., pp. 112 and 116); and the subsequent decision of *Bank Line, Ltd. v. Arthur Capel & Co.* (6) and other cases proceed on different lines. I doubt very

(1) L. R. 9 Ex. 38.

(2) These were the cases where questions arose between the parties to contracts to take places to view the coronation procession of King Edward VII. when it was postponed owing to his sudden illness: see *Krell v. Henry* [1903] 2 K. B. 740; *Blakeley v. Muller &*

Co. [1903] 2 K. B. 760n.; *Civil Service Co-operative Society v. General Steam Navigation Co.* [1903] 2 K. B. 756; *Chandler v. Webster* [1904] 1 K. B. 493.

(3) [1918] A. C. 119.

(4) [1917] 2 K. B. 1, 23-30.

(5) [1916] 2 A. C. 397.

(6) [1919] A. C. 435.

much whether *Charlesworth v. Holt* (1) would now be decided in the same way, and whether the continued existence of the marriage tie would not be treated as an implied fundamental condition of the continuance of the obligations of the deed.

If this point should hereafter be discussed in an action based on a deed the decision in *Wasteneys v. Wasteneys* (2) will of course have to be considered with a reservation that that case also was before the development of the law in the Coronation cases and in the Frustration cases during and following the war.

There remains to consider how far the Court of Appeal decisions have modified the practice of the Divorce Court, as stated by its four Presidents. The two appeal decisions in *Gandy v. Gandy* (3) leave the authority of that case in a very unsatisfactory state. By a deed of separation, the wife and husband agreed (1.) that the wife should not be entitled to the custody of the two younger children, but that the father should maintain them and settle to what school they should go, and where they should live ; (2.) that the husband should pay the wife an allowance of 250*l.* a year for herself and the two elder daughters ; (3.) that the wife should not apply for further alimony. After the deed the husband committed fresh adultery. The wife thereupon applied for a judicial separation, and applied for and obtained, contrary to the provisions of the deed, the custody of the two younger children. She then applied for further alimony. Sir James Hannen held that the deed contained an implied *dum casta* clause, and granted her further alimony. He might have said, but did not, that as he had jurisdiction to grant judicial separation, he had jurisdiction, if he thought just, to make orders ancillary on such a decree. The Court of Appeal held that a *dum casta* clause could not be implied, and being under the impression that the husband did not dispute his liability to maintain the younger children, thought there was no change of circumstances, and dismissed the wife's petition. The husband then alleged that as the custody

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Scrutton L.J.

(1) L. R. 9 Ex. 38.

(2) [1900] A. C. 446.

(3) 7 P. D. 168 ; 30 Ch. D. 57.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Scrutton L.J.

given under the separation deed had been changed, he was not under liability to maintain the younger children. I should like to say, on the opinion expressed by some of my brethren on repudiation by the husband, that there is authority to show that to take a mistaken view of the meaning of a covenant is not to repudiate it, but to say that you are attempting to observe it misapprehending what its meaning is. One of the children by her next friend brought a Chancery action to enforce the deed; Bacon V.-C. made a decree in her favour; the Court of Appeal, on appreciating how the change of custody had altered the situation, held (1.) that neither the younger nor elder children could enforce the deed; (2.) that the wife could sue on it, and that in view of the change of custody, and the attitude of the husband, she should be allowed to present a petition for further alimony in spite of her covenant in the deed. She did so, and Barnes J. in *Judkins v. Judkins* (1) states that the Divorce Court granted the wife on her application 750*l.* alimony, being an increase of 500*l.* on the amount named in the deed, and the Court of Appeal stayed the Chancery proceedings. The judgments of the Court distinguished proceedings after divorce from proceedings for judicial separation. *Morrall v. Morrall* (2) is referred to without disapproval by Cotton and Lindley L.JJ. as based on an order dissolving the marriage. Even in judicial separation the wife was allowed to apply for and obtain an order for increased alimony based no doubt on a change of circumstances as to the children, but also on an increase of her liability under the order for judicial separation, giving her the custody of, and the duty to maintain the children, contrary to the deed. I should myself have thought the right of the Court to make orders for alimony contrary to the deed followed from and was incidental to their statutory right to make an order for judicial separation. But in any event it appears impossible to extract any restriction of the powers to grant maintenance after an order dissolving the marriage from *Gandy v. Gandy* (3), in view

(1) [1897] P. 138, 149.

(2) 6 P. D. 98.

(3) 7 P. D. 168.

of the express reservation of these powers, without disapproval of *Morrall v. Morrall* (1) by the Court.

There remains the decision of the Court in the two cases of *Bishop v. Bishop* (2) and *Judkins v. Judkins*. (2) *Bishop v. Bishop* (2) was the case of an application for maintenance after a dissolution of marriage based on adultery, subject to a separation agreement containing a clause for payment of maintenance, but no covenant not to ask for further maintenance. *Judkins v. Judkins* (2) was an application for maintenance after a decree for judicial separation based on adultery subsequent to a separation deed which contained a covenant to pay maintenance, but no covenant by the wife not to ask for further maintenance. The effect of the decision in *Gandy v. Gandy* (3) was carefully considered, and the Court of Appeal held that nothing was decided in *Gandy v. Gandy* (3) as to the statutory powers of the Court in suits for dissolution of marriage. Certainly nothing was decided in *Bishop v. Bishop* (2) limiting that power. *Morrall v. Morrall* (1) was not doubted in any way. The passage already referred to from the judgment of the Court (4) says that the contention cannot be right that attention is only to be paid to the terms of the separation deed and not to the wife's fortune, the ability of the husband and the conduct of the parties. But the contention which "cannot be right" is the contention of the appellants in the present case. They allege that on the attention of the Court being called to a covenant by the wife before the adultery complained of not to ask for further maintenance, the Court should at once hold its hand and give no consideration to the other matters which by statute they ought to consider. I think their contention is wrong; that there is nothing in the two Court of Appeal decisions to impugn the practice of the four experienced Presidents of the Divorce Division already referred to, and that such practice is correct in principle for the reasons I have stated.

I repeat that nothing in this decision fetters the discretion of the Court as to what effect they should give to the separation

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Scrutton L.J.

(1) 6 P. D. 98.

(3) 7 P. D. 168.

(2) [1897] P. 138, 149.

(4) [1897] P. 138, 164.

C. A.
1928

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

deed, when they come to consider the matters which they are directed by statute to consider, including "the conduct of the parties." I only decide that the mere fact of a covenant in a separation deed not to ask for further maintenance does not in itself and without more oust the jurisdiction of the Court to consider an application for further maintenance. The appeals in my opinion should be dismissed with costs.

LAWRENCE L.J.

HYMAN v. HYMAN.

The two main questions which arise on this appeal are: First, whether on the true construction of the separation deed the covenant by the wife not to endeavour to compel the husband to allow her any alimony or maintenance further than the agreed allowance of 20*l.* a week is limited in duration to the existence of the marriage tie or continues after the dissolution of that tie in the lifetime of the spouses; and secondly, whether if on the construction of the deed the covenant extends beyond the existence of the marriage tie it binds the wife in the event of her obtaining a decree for divorce or whether in that event she is released from her obligation and the Court is at liberty to disregard her covenant. Although these two questions are, in my opinion, separate and distinct questions, counsel for the wife seem to me to have shown a tendency to mix them up and confuse the one with the other. I propose to deal first with the construction of the deed. It contains a covenant by the husband for himself, his executors or administrators to pay the agreed allowance to the wife during her life and a covenant by the wife that neither she nor any person on her behalf would at any time thereafter endeavour to compel the husband to allow her any further maintenance or alimony.

These two covenants are in my opinion reciprocal, the obvious intention of the parties, as gathered from the deed, being that so long as the husband remains liable under his covenant to pay the agreed allowance, the wife will not endeavour to compel him to allow her any further alimony or maintenance. The only provision contained in the deed

terminating the operation of these two covenants is in case the husband and the wife should at any time thereafter resume cohabitation. The deed contains no provision that the parties should live apart in chastity and no such provision will be implied. Therefore the husband's covenant to pay the agreed allowance remains operative notwithstanding the subsequent adultery of the wife (see *Fearon v. Earl of Aylesford* (1)), and the wife's covenant not to endeavour to compel the husband to make her a further allowance remains operative notwithstanding the subsequent adultery of the husband: see *Gandy v. Gandy*. (2)

There is no provision in the deed (such as is not uncommonly contained in separation deeds) terminating the operation of these two covenants in the event of a dissolution of the marriage, and it would in my opinion be contrary to well-settled principles to imply any such provision in the present case.

Lord Parker, in *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* (3), points out that the principle underlying all cases in which a contract has been held to determine upon the happening of some event which frustrates the object which the parties have in view is a principle of contract law depending upon some condition to be implied in the contract itself, and that it is impossible to imply any such condition if it be inconsistent with the express provisions of the contract or with the intention of the parties as gathered from those provisions, and further that it is more difficult to imply a condition subsequent defeating the contract when it is part performed than a condition precedent before its execution has commenced.

In the present case the separation deed was clearly intended to remain operative after the dissolution of the marriage tie, as, in the event of the husband predeceasing the wife, his covenant to pay the allowance remains binding on his estate during the remainder of her life, and it cannot therefore be said that the deed was based on the continued existence of

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

(1) (1884) 14 Q. B. D. 792.

(2) 7 P. D. 168.

(3) [1916] 2 A. C. 397, 422.

C. A. 1928
 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.
 Lawrence L.J.

the marriage tie. Both the husband's covenant and the wife's covenant are absolute in terms and there is no provision in the deed terminating either of them, except the single condition in case of the resumption of cohabitation. This express condition in my opinion negatives an implied term that either of the covenants should terminate in some other event not specified in the deed, such as the dissolution of the marriage tie by a decree for divorce. Either the omission of such a provision was intentional or else (which I think may probably have been the case here) it was due to the fact that a divorce was not in the contemplation of the parties; in either case, however, the parties cannot, in my opinion, be considered as having intended that such a provision should be implied. The principle that no condition will be implied restricting liability under a covenant absolute in terms on the happening of an event not in the contemplation of the parties was considered in the Court of Appeal in *Fearon v. Earl of Aylesford*. (1) There the parties had entered into a deed of separation which did not contain a *dum casta* clause and the husband contended that such a clause ought to be implied, as otherwise the deed would be against public policy. Sir William Balfour Brett M.R. (2) says: "Now I entirely agree that when a covenant is made between two persons in plain terms, from which the only inference to be drawn is that they intended what they have said, it is a most dangerous doctrine to introduce into that covenant, unless one is forced to do it by almost inevitable necessity, another covenant which everybody must know, the parties did not intend to introduce, on the ground that, unless it be introduced the contract between the parties is against public policy," and Cotton L.J. (3), after referring to the fact that, although a *dum casta* clause was not by any means unusual in separation deeds, yet it had not been inserted in the deed in that case, proceeds as follows: "It is very true that we cannot suppose the parties here to have had in their minds that there would be unchastity on the

(1) (1884) 14 Q. B. D. 792.

(2) 14 Q. B. D. 799.

(3) 14 Q. B. D. 807.

part of the wife, but they have omitted to make a provision for that which was not in their minds, namely, the fact of her leading an unchaste life. There have been decisions during the last fifty years . . . that adultery alone on the part of the wife is not an answer to her claim to be paid her annuity ; and in my opinion this fact shows that the parties cannot be considered as having intended that the provision against unchastity should be implied." Lindley L.J. stated he was of the same opinion, and in the result the Court declined to imply a provision restricting the liability of the husband under his covenant to so long as the wife should remain chaste.

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

The same principle has been applied in cases where it has been sought to imply a provision in separation deeds restricting the liability of the husband under a covenant absolute in terms to such time as the marriage tie should be subsisting and should not have been dissolved by a decree for divorce, for example the cases of *Goslin v. Clark* (1) and *Charlesworth v. Holt*. (2)

In *Goslin v. Clark* (1) the separation deed was executed before the Matrimonial Causes Act, 1857, had been passed, and therefore before the Court had power to grant a decree for divorce. After the Act had become law the husband obtained a divorce on the ground of his wife's adultery committed before the separation deed, and then contended that his liability under his covenant to pay her an annuity during her life had terminated, on the ground that a provision ought to be implied in the deed restricting his liability to such time as the marriage tie remained undissolved. The Court of Common Pleas decided against the husband's contention. Williams J., after referring to the terms of the covenant and pointing out that the husband, having covenanted for himself his executors and administrators, did not contemplate that the annuity should be only commensurate with the period during which the wife was fulfilling the character of his wife, because it was to continue when she should become his widow, when his obligation to support her would be at an end, proceeds as follows (1): "The

(1) 12 C. B. (N. S.) 681, 692.

(2) L. R. 9 Ex. 38, 40.

C. A. Divorce Act 20 and 21 Victoria, Chapter 85, not having then
 1928 passed, the notion of a dissolution of the marriage must have
 HYMAN been altogether out of the mind of the defendant. The
 v. intention was, that the wife should have an annuity of 100*l*.
 HYMAN. for the term of her life provided she complied with the
 HUGHES condition imposed, and led a chaste and moral life. We cannot
 v. allow the husband by his own act to absolve himself from his
 HUGHES. engagement.”
 Lawrence L.J.

In *Charlesworth v. Holt* (1) the husband covenanted to pay to the trustees of the deed an annuity for his wife's support “during their joint lives and so long as they should live separate and apart.” The trustees brought an action for arrears of the annuity and the husband, who had obtained a divorce on the ground of his wife's subsequent adultery, defended the claim on the ground that his covenant was impliedly limited to the subsistence of the marriage tie and that, as that tie had been dissolved by a decree for divorce, he was no longer liable. The Court of Exchequer decided against the husband. Kelly C.B. says (1): “The husband might, in this case, have introduced express words limiting his liability to the period during which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie. It is impossible for the Court to add such a term to the contract. If the contract were to be so construed, it would be possible for the husband, by giving grounds to his wife for a petition for divorce against him, to put an end to his liability. Suppose, for example, he were guilty of adultery and desertion, and the wife obtained a decree for dissolution, he would be freed by means of his own misconduct. We certainly ought not, unless constrained by express words or clear implication, so to interpret the contract.” Bramwell B., in giving judgment to the same effect, says (2) (*inter alia*) “it is plain that a divorce was not in the contemplation of either party; but I nevertheless see nothing to restrict the operation of the

(1) L. R. 9 Ex. 38, 40.

(2) L. R. 9 Ex. 38, 41.

defendant's covenant, except the single condition that Lucy Holt and himself shall be living separate and apart."

C. A.

1928

The decision in *Fearon v. Earl of Aylesford* (1) shows that no provision restricting the husband's liability under a covenant absolute in terms will be implied on the ground that the covenant, unless so restricted, would or might be against public policy. And the cases of *Goslin v. Clark* (2) and *Charlesworth v. Holt* (3) show that no provision restricting the husband's liability under a covenant absolute in terms will be implied on the ground that such covenant, when contained in a separation deed, ought to be construed as being commensurate only with the period during which the wife is fulfilling the character of wife.

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L. J.

In my judgment the principle upon which these cases were decided apply equally to a covenant by a wife not to sue the husband for further maintenance, and accordingly no provision restricting the operation of such a covenant, if absolute in terms, ought to be implied either on the ground that, unless so restricted, the covenant might be against public policy, or on the ground that the covenant ought to be construed as being commensurate only with the period during which the husband is fulfilling the character of husband. In the result therefore I am of opinion, for the reasons stated, that on the true construction of the separation deed in the present case the wife's covenant not to endeavour to compel the husband to allow her any further maintenance is not, either expressly or impliedly, limited in duration to the existence of the marriage tie, and accordingly that as a matter of construction the covenant continues operative after the dissolution of that tie in the lifetime of the spouses.

I now turn to the second question in the case—namely, whether the covenant so construed ceases to be binding on the wife on her obtaining a divorce, and whether the Court in such an event is at liberty to disregard it. This question is one of general importance not only because the covenant in question is a common form covenant inserted in almost

(1) 14 Q. B. D. 792.

(2) 12 C. B. (N. S.) 681.

(3) L. R. 9 Ex. 38, 41.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lawrence L.J.

every separation deed from the earliest times, but also because, since the passing of the Matrimonial Causes Act, 1923, a wife can obtain a divorce on the grounds of her husband's adultery alone. If (as counsel for the wife in the present case have strenuously contended) a wife is precluded from entering into a binding contract not to apply for further maintenance during the rest of her life, she will be placed at a serious disadvantage when bargaining for an allowance from her husband, who is not likely to make her a generous allowance, or an allowance during the whole of her life, if after a divorce she could disregard her obligations under the deed and use the allowance which the husband has agreed to make as a means of obtaining a larger allowance from the Court.

The only two grounds urged before the Court in support of the wife's contention on this point are, first, that the covenant is against public policy and therefore unenforceable and, secondly, that it constitutes an interference with the discretionary powers conferred on the Court in case of a decree for divorce, and that therefore the Court can and ought to disregard it.

Before dealing more in detail with each of these grounds, it is necessary to mention certain facts in the present case which have a direct bearing on the question under consideration. At the date of the separation deed, adultery alone on the part of the husband did not furnish a valid ground for a decree for divorce at the instance of the wife, and it was not until four years later, when the Act of 1923 was passed, that the wife acquired the right to divorce her husband for adultery alone. The circumstances under which the deed of separation was executed have not changed. At the date of the deed the husband was living in adultery with the same woman as the one with whom he was proved to have committed the acts of adultery which formed the foundation of the decree for divorce. The only alteration which had taken place subsequently to the deed was the passing of the Act which granted the new remedy of divorce to the wife. The divorce proceedings were, in the opinion of the learned judge who made the decree for divorce, taken by the wife with the

object of enabling her to apply to the Court for increased maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925.

C. A.
1928

The position, therefore, is that the wife, after having accepted the benefits of the deed (which besides the weekly allowance of 20*l.* included the payment to her of two substantial sums of money), is now seeking by reason of her own act, to which the husband is not a consenting party, to deprive him of the benefit of her covenant on the sole ground of his subsequent acts of adultery with the same woman with whom he was living in adultery when the deed was executed, and which acts, but for the passing of the statute of 1923, would not have furnished any valid reason for releasing his wife from her covenant.

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
—
Lawrence L.J.

Next, it is to be observed that the wife is not asking the Court to exercise any of its powers in relation to the custody, maintenance or education of any children of the marriage. It seems to me obvious that no agreement between the spouses purporting to affect the rights or interests of children would bind the children or operate to prevent any application being made on their behalf to the Court to exercise its powers in their favour. Nor is the wife asking the Court to exercise its power to vary settlements. Even if the deed of separation be a settlement within the meaning of s. 192 of the Act, the Court could not in the present case make any order varying such settlement which would benefit the wife, as the scope of that section is limited to a variation of the application of the property settled, the whole of which she has received and is still receiving, and the Court is not empowered either to strike out the wife's covenant not to sue for further alimony or maintenance or to compel the husband to bring any further property into settlement.

It is also to be observed that the husband has not committed any breach of his obligations under the deed, nor has he done any other act which would disentitle him to enforce the wife's covenant in a Court of equity.

Dealing now with the question whether the wife's covenant is against public policy ; it is, of course, well settled that all

C. A. provisions, whether made before or after marriage, for a future separation of the spouses or for a future dissolution of the marriage contract, are void on the ground of public policy. 1928
 HYMAN v. HYMAN. "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate": per Wood V.-C. in *H. v. W.* (1) HUGHES v. HUGHES. To allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves: see Pollock on Contract, 9th ed., p. 378. This principle is applicable both to provisions for a future separation, judicial or otherwise, and to provisions for a future divorce.

— 2 X 19
 Lawrence L.J.

On the other hand, it is equally well settled that a contract providing for and arranging the terms of an immediate separation is good and enforceable. It is made to meet a state of things which, however undesirable in itself, has in fact become inevitable: see Pollock on Contract, 9th ed., p. 377. It has, however, never been decided whether express provisions contained in a separation deed for what is to happen in the event of a future judicial separation or of a future divorce are or are not void as against public policy, but the Court of Appeal in *Bishop v. Bishop* (2) considered such provisions to be of doubtful validity.

If therefore the deed in the present case had contained an express covenant that in the event of the wife thereafter obtaining a divorce she should not apply for any further maintenance, it might be that such a covenant would be held to be void as against public policy and as coming within the first of the principles to which I have referred, but I express no opinion on this point, as it does not arise in the present case. It was not and could not be suggested that in the present case the deed was framed and designed with the express object of regulating the affairs of the spouses in the event of a future divorce. The most that can be said here is that the parties have not inserted a provision terminating the wife's covenant on a future dissolution of the marriage,

(1) (1857) 3 K. & J. 382, 387.

(2) [1897] P. 138.

and I fail to see that there is anything against public policy in not inserting such a provision or in holding the wife to the clear terms of her bargain. In my opinion the contention that the wife's covenant is void because it amounts in effect to a licence to the husband to commit adultery cannot successfully be maintained in view of the authorities I have mentioned. The grounds stated by Cotton L.J. in *Fearon v. Earl of Aylesford* (1) for rejecting the contention that a husband's covenant to pay an annuity, continuing after the wife's adultery, would be contrary to public policy and therefore void, apply with equal force to the similar contention in respect of the wife's covenant in the present case.

In the result for the reasons stated I am of opinion that the contention that the wife's covenant in the present case is against public policy and therefore unenforceable is not well founded.

There remains the question whether the Court is at liberty to disregard the wife's covenant, because it constitutes an attempted interference with the powers conferred on the Divorce Court. In presenting their argument on this question counsel for the wife seem to me to have lost sight of the distinction between a contract not to invoke the aid of the Court and a contract purporting to control or regulate the mode in which the Court should exercise its powers after its aid has been properly invoked.

Before the Judicature Acts it was the common practice of the Courts of equity to grant injunctions restraining proceedings in Courts of common law and in the Divorce Court in breach of covenant. This practice was altered by s. 24, sub-s. 5, of the Judicature Act, 1873, which provided that no injunctions restraining proceedings in the High Court were in future to be granted, but every matter of equity on which an injunction against the prosecution of any such proceedings might formerly have been obtained might be relied upon by way of defence. This section is re-enacted by s. 41 of the Supreme Court of Judicature (Consolidation) Act, 1925.

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

(1) 14 Q. B. D. 792, 808.

C. A. The question therefore resolves itself into whether before
1928 the Judicature Act, 1873, a Court of equity would have
HYMAN granted an injunction to restrain the wife from applying
v. to the Divorce Court for further maintenance in breach of her
HYMAN. covenant; if it would have done so it is in my opinion the
HUGHES plain duty of the Divorce Court to give effect to her covenant
v. by declining to entertain her application.
HUGHES.
Lawrence L.J.

If the wife's covenant on the true construction of the separation deed is not limited in duration to the existence of the marriage tie, and if the covenant is not void as being against public policy, I have the greatest difficulty in appreciating on what grounds a Court of equity could formerly have refused to enforce it by injunction or on what grounds the Divorce Court can now refuse to give effect to it.

Sect. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, confers powers on the Divorce Court to grant maintenance to a wife on a decree for divorce or nullity of marriage and to grant alimony to a wife on a decree for restitution of conjugal rights or judicial separation. Obviously the Divorce Court can only exercise these powers on being applied to for that purpose by the wife, who is the only person interested in procuring the Court to exercise these powers, which are conferred solely for her benefit.

In the absence of any contract to the contrary the wife is free to make an application for maintenance on obtaining a divorce or not to make such an application, just as she pleases. No third party can make such an application on her behalf unless she is under some disability, and neither the Court nor any third party can compel her to make such an application. Then why is not the wife at liberty to contract not to make such an application?

One strange result of holding that she is precluded from making such a contract would be that she could not, after having presented a petition for maintenance, compromise the proceedings but would have to prosecute them to judgment. Another result would be that a wife could not between the decree nisi and the decree absolute come to an agreement with the husband on the question of maintenance, a

course which counsel for the husband asserted was often adopted in practice.

If, contrary to my opinion, the Divorce Court could exercise its powers under s. 190 without any application for that purpose being made to it by the wife, the wife's covenant in the present case does not purport to prevent the Court from so doing, as the covenant only prevents the wife from taking any steps herself to obtain an order for further maintenance. That, however, is not the question which the Court is considering on this appeal. Here the sole question is whether the wife having contracted not to endeavour to compel the husband to make her any further allowance, and having in direct breach of that covenant presented a petition to the Divorce Court with the avowed object of endeavouring to obtain an order compelling the husband to make her a further allowance, ought to be allowed to proceed with that petition. Assuming the validity of the covenant such a proceeding would, in my opinion, undoubtedly have been restrained by a Court of equity before the Judicature Act, and therefore the Divorce Court ought not to allow the petition to proceed.

The grounds on which the Courts of equity formerly acted when enforcing covenants of this nature rests, in my opinion, on well established principles—namely, first, that any person who is competent to enter into a binding contract may agree to renounce the advantage of a statutory provision made solely for his or her individual benefit, and, secondly, that no person is entitled to accept the benefits of a contract and repudiate the obligations.

These principles have been applied by Courts of equity to contracts renouncing advantages conferred by the Matrimonial Causes Acts.

In *Hunt v. Hunt* (1) Lord Westbury, after stating that separation deeds are to be treated as ordinary contracts capable of being enforced at common law, decided that it was the duty of a Court of equity to interfere by its injunction and restrain the breach of a covenant by a husband not to institute a suit for the restitution of conjugal rights

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

(1) 4 D. F. & J. 221.



C. A. on the ground that the power conferred on the husband to
 1928 institute such a suit was a private remedy and a private right
 belonging to the husband which he could contract to
 renounce.

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

In *Williams v. Baily* (1) the Court declined to grant an interlocutory injunction to restrain the wife, who had presented a petition for a judicial separation, from proceeding with an application for alimony pendente lite in breach of a covenant in a separation deed (which covenant was in practically identical terms with the covenant in the present case) entered into by trustees on behalf of the wife, on the sole ground that it was not shown to the satisfaction of the Court that the wife had acted on the deed so as to preclude herself from taking the proceedings. The Court accordingly directed the motion to stand over until the hearing of the cause, but required the wife to give an undertaking to deal with any alimony which she might be awarded as that Court should direct. The reason why the undertaking was exacted seems clear. The Vice-Chancellor had refused interlocutory relief, but the right to the injunction might be established at the trial. Meanwhile the wife might have obtained an order for alimony which she ought not to have applied for. It was necessary, therefore, to put her under the terms of the undertaking. In delivering his judgment Wood V.-C. stated the principles upon which Courts of equity act in cases of this kind in no uncertain terms as follows (2): "There can be no doubt that deeds of this description are perfectly valid, nor can there be any doubt that they can be enforced against the wife, who is not entitled to 'approve and reprobate,' or, in other words, to accept the benefits and repudiate the obligations."

In *Besant v. Wood* (3) the Master of the Rolls held that a wife had the right to contract to live apart from her husband and that the husband could enforce such a contract against her, and accordingly granted an injunction to restrain the wife from applying to the Divorce Court for a decree for

(1) L. R. 2 Eq. 731.

(2) L. R. 2 Eq. 734.

(3) 12 Ch. D. 605.

restitution of conjugal rights in violation of a covenant on her behalf contained in a separation deed. The basis of this decision was that the right conferred on a married woman to institute a suit for restitution of conjugal rights involves a right not only to compromise after she has commenced a suit, but also to compromise before the litigation has begun, and that therefore her contract not to institute such a suit was valid and enforceable.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lawrence L.J.

In *Marshall v. Marshall* (1) Sir James Hannen dismissed the wife's suit for restitution of conjugal rights brought by her in breach of a covenant contained in a separation deed on the ground that before the Judicature Act a Court of equity would have granted an injunction to restrain the wife from taking such proceedings.

In *Rose v. Rose* (2) the Master of the Rolls states: "As was pointed out in *Besant v. Wood* (3), unless a married woman was allowed to contract herself out of her rights in the Divorce Court, no proceedings in that Court could ever be compromised, but must be fought out to the end."

In the case of *Morrall v. Morrall* (4), which was much relied upon by counsel for the wife, Sir James Hannen held that a wife who had obtained a decree for divorce on the ground of her husband's incestuous adultery was entitled to apply for and obtain the usual order for permanent maintenance notwithstanding that she had by a separation deed agreed to accept certain sums of money and not to sue her husband for any further maintenance. The reasons given by the learned President for his decision were that a state of things had arisen which was not in the contemplation of the parties when the deed was executed, that the separation deed was not a licence to the husband to commit adultery incestuous or otherwise, and that while the deed continued the wife was entitled to no more than what was stipulated for by it; but that when it had been established that the husband had been guilty of incestuous adultery she was no longer restrained by the deed. These reasons are in my

(1) 5 P. D. 19.

(3) 12 Ch. D. 605.

(2) (1883) 8 P. D. 98, 99.

(4) 6 P. D. 98.

C. A. 1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lawrence L.J.

opinion unconvincing. They are based first on an implied condition in the separation deed terminating the wife's covenant in the event of the husband committing incestuous adultery, and secondly, on the wife's covenant being in effect a licence to the husband to commit adultery. I shall have to revert to this decision later, but desire to state here that both of these reasons are in my opinion unsound, and would not formerly have furnished any ground in a Court of equity for the refusal of an injunction.

Then came the first case of *Gandy v. Gandy*. (1) In that case the separation deed contained a covenant that the wife would not take any proceedings to compel the husband to allow her any further alimony beyond an agreed sum. The husband subsequently committed adultery and the wife obtained a decree for judicial separation, and thereupon applied to the Court for increased alimony. Sir James Hannen held that the subsequent adultery of the husband deprived him of the right to have the restraining provisions of the deed enforced. The grounds upon which the learned President based his decisions were those stated by him in *Morrall v. Morrall* (2), which after consideration he re-affirmed, observing that to hold otherwise would make the contract extend to a state of things not in the contemplation of the parties and moreover would amount to a licence to the husband to commit adultery for the rest of his life without subjecting himself to any liabilities beyond those imposed by the deed. The learned President added that in all cases such as that it was implied in the contract contained in the deed that it had reference only to the parties being separated without more and not to their living apart in the state of adultery, and that the deed must be construed as an agreement that the parties should live apart in chastity. It is quite plain from the judgment delivered by the learned President that he drew no distinction between the case where the wife had obtained a decree for divorce and the case where she had obtained a decree for judicial separation, and that in his opinion the same reasons applied to the one as to the other.

(1) 7 P. D. 77.

(2) 6 P. D. 98.

The first case of *Gandy v. Gandy* went to the Court of Appeal (1), and the learned President's decision was unanimously reversed. Sir George Jessel M.R., in the course of his judgment, after pointing out that it was settled law that the husband's covenant was not affected by his subsequent adultery and that the Legislature had not given the Court power to vary settlements in the case of judicial separations, as it had done in cases of divorce, and that therefore the separation deed remained binding, proceeded to consider the question whether the Court could interfere with the contract except when one of the parties had so acted as to disentitle him to rely upon the contract at all. As regards the President's opinion that it would be against public policy if the wife's covenant were to be held to continue after the decree for judicial separation the Master of the Rolls, after remarking that there was no reason more dangerous to give, stated his reasons for arriving at the conclusion that a continuance of the wife's obligations under her covenant would not be against public policy. The Master of the Rolls further arrived at the conclusion that the adultery of the husband did not amount to misconduct on his part so affecting the position of the wife as to entitle her to repudiate the contract she had entered into. There is only one passage in this judgment (2) which in my opinion is open to criticism—namely, that in which the learned judge says that “in the case of dissolution of marriage the Court has had conferred upon it the right to vary . . . settlements, and to deal with them in any way which may be thought just and expedient.” This statement is too wide, as the Court's power, as I have already pointed out, is strictly confined to a variation of the application of the settled property, but it was obiter and does not affect the principles upon which the judgment was founded. Cotton L.J., after pointing out that the wife's application was clearly contrary to one of the covenants contained in the separation deed, stated that the questions to be considered might be put in two ways, whether the covenant could under the circumstances be disregarded or

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

(1) 7 P. D. 168.

(2) 7 P. D. 172.

C. A. whether a Court of equity would under the circumstances
1928 have enforced the covenant against the wife. The learned
HYMAN Lord Justice stated that he could not agree with the President's
v. conclusion that the separation deed ought to be read as con-
HYMAN. taining an implied condition that it should be operative
HUGHES so long as the parties live chastely nor with the conclusion
v. that to hold that the husband was right would be to say that
HUGHES. the deed contemplated and allowed adultery on the part
Lawrence L.J. of the husband. In speaking of *Morrall v. Morrall* (1) the
learned Lord Justice said that it might well be that the
gross misconduct of the husband in that case might prevent
the husband from relying on the deed and render it just that
the wife's covenant should be disregarded by the Court.
In my opinion the decision in *Morrall v. Morrall* (1) cannot
be supported on that ground. The learned President in
deciding that case did not lay stress on the incestuous
character of the adultery except as affording a ground for
divorce. There were no facts there which would warrant
the conclusion that the husband had been guilty of such
gross misconduct as would disentitle him to enforce the
wife's covenant in a Court of equity. Lindley L.J. said that
the question might be put in this shape, whether there had
been any sufficient reason given for holding the wife discharged
from her covenant not to sue for further alimony. After
pointing out that prima facie she was bound by her covenant,
which was a perfectly good covenant, and stating that the
order appealed from set aside that covenant, the learned
Lord Justice came to the conclusion that this was not right,
and that mere adultery by the husband was not sufficient
to deprive him of the benefit of the stipulation as to alimony.
The learned Lord Justice in the course of his judgment
further said that the cases, of which *Morrall v. Morrall* (1)
was one, where the Divorce Court had dealt with separation
deeds after decrees for dissolution, were rather misleading
when they were sought to be applied in a case where the
Court had no such extensive jurisdiction. From this dictum
it would appear as if Lindley L.J. had fallen into the same

error as the Master of the Rolls as to the scope of the Court's power to vary settlements and to have thought that *Morrall v. Morrall* (1) was a case where the Court either had made, or could have made, the order for an increased allowance in exercise of the more extensive jurisdiction of varying settlements conferred upon it in the case of divorce.

The conclusions of the Court of Appeal in the first case of *Gandy v. Gandy* (2) therefore may be summarized as follows: that a wife's covenant not to endeavour to compel the husband to allow her any further alimony or maintenance is a valid covenant binding on her; that no *dum casta* clause will be implied in a separation deed, and consequently that the husband can enforce the covenant notwithstanding his subsequent adultery, which does not amount to such gross misconduct on his part as to disentitle him to relief in a Court of equity; and that the fact that the wife has obtained a decree for judicial separation with the result that the spouses are no longer living apart by agreement but by the decree of the Court upon the making of which the Court has a statutory power to make such order for alimony as it thinks just, affords no ground for enabling the Court to disregard the wife's covenant.

In my judgment these conclusions and the reasons upon which they are founded apply just as much to a case like the present, where the wife has obtained a decree for divorce, as they do to the case where the wife has obtained a decree for judicial separation.

Apart from the slight (and in my opinion wholly immaterial) difference in the expressions "as the Court may deem to be reasonable" and "as the Court thinks just" occurring respectively in sub-ss. 1 and 4 of s. 190, the only distinction between the powers conferred on the Court on a decree for divorce and on a decree for judicial separation is that in the case of divorce the matters which the Court is to take into account when ordering the husband to secure the maintenance, and the method in which the maintenance is to be secured, are stated, whereas in the case of judicial separation there

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lawrence L.J.

are no such statements. This distinction in my opinion is accounted for by the fact that these sub-sections are in substance re-enactments of ss. 17 and 32 of the Matrimonial Causes Act, 1857, and that a decree for divorce was then an entirely new remedy conferred for the first time by that Act. The Legislature therefore no doubt considered it advisable to state what matters the Court should take into account in providing for permanent maintenance and how the order should be carried out, whereas in the case of a judicial separation (which was equivalent to a divorce a mensa et thoro) there was no such necessity, as the practice of the Ecclesiastical Courts as regards the matters to be taken into account in granting alimony (which matters are in fact the same as those which the Court is required to take into account in the case of divorce) was well established, and the jurisdiction in all matrimonial matters exercised by such Courts was transferred to the Divorce Court.

The express provisions in sub-s. 1 of s. 190, that the Divorce Court is to have regard to certain specified matters when ordering the husband to secure maintenance for his wife, for whatever reason they may have been inserted, do not in my opinion affect the question whether a wife is entitled in breach of her contract to apply to the Divorce Court to exercise its power in her favour. Moreover it is to be noted that these provisions are not repeated in sub-s. 2 of s. 190. Even assuming that they apply to an order made under that sub-section I am of opinion that a Court of equity would formerly have restrained the wife from making the application to the Divorce Court notwithstanding that the Divorce Court was invested with a discretionary power to make or withhold an order in her favour and notwithstanding that the Legislature had indicated how that discretion was to be exercised, and in what manner its order when made was to be carried out.

The fact that the Divorce Court has in cases of divorce the additional power to vary settlements in my opinion has no bearing on the question we have to decide, because, as already pointed out, the present case is not concerned with the exercise of that power.

I am further of the opinion that the decision of the Court of Appeal in the first case of *Gandy v. Gandy* (1) entirely cuts away the grounds upon which Sir James Hannen based his judgments in *Gandy v. Gandy* (2) and in *Morrall v. Morrall* (3), and that the decision in the latter case cannot stand in the face of the decision of the Court of Appeal in the former case.

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

I have already expressed my opinion on the dicta of Sir George Jessel M.R. and Lindley L.J. that the decision of *Morrall v. Morrall* (3) might be distinguished on the ground of the more extensive power to vary settlements conferred on the Court in case of divorce and on the dictum of Cotton L.J. that *Morrall v. Morrall* (3) might be supported on the ground of the gross nature of the conduct of the husband. It follows from what I have said about these dicta that in my judgment the contention that the Court of Appeal in the first case of *Gandy v. Gandy* (1) has approved of the decision in *Morrall v. Morrall* (3) cannot be upheld.

It was, however, again suggested in the present case that the decision of the Court of Appeal in the first case of *Gandy v. Gandy* (1) had been much shaken by what occurred in the second case of *Gandy v. Gandy* (4), when the latter case came before the Court of Appeal. In my opinion any doubt there may at one time have been on this question was entirely dispelled and completely laid at rest by the clear and emphatic statement made by Lindley L.J. when delivering the judgment of the Court of Appeal in *Bishop v. Bishop* (5), which I will not repeat but which affords a complete answer to the suggestion that the decision in the first case of *Gandy v. Gandy* (1) is not to be relied on.

The actual decision in the second case of *Gandy v. Gandy* (4) has in my opinion no direct bearing on the question to be decided in the present case. The ground upon which the Court allowed the wife to proceed with her application for alimony in that case notwithstanding her covenant was that

(1) 7 P. D. 168.

(3) 6 P. D. 98.

(2) 7 P. D. 77.

(4) 30 Ch. D. 57.

(5) 1897] P. 138.

C. A.
1928

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

Lawrence L.J.

the husband had repudiated his obligations under the deed of separation by refusing to contribute to the maintenance and education of the two younger children, and that this repudiation operated to release the wife from her obligation not to apply for further maintenance. In the present case nothing of that kind has occurred.

The only other case which requires consideration is *Bishop v. Bishop*. (1) In that case the parties had signed an agreement whereby the wife agreed to accept a specified allowance by way of permanent maintenance, which allowance was to include the maintenance of the child of the marriage, the custody of which was given to the wife. It was expressly stipulated that the allowance was to be paid whether the parties remained married or the marriage should thereafter be dissolved. The agreement contained no stipulation by the wife not to sue for more than the agreed allowance. After the agreement the wife obtained a divorce on the ground of the husband's subsequent adultery and desertion, the decree giving the custody of the child to the wife, who then applied to the Court for maintenance for herself and for the child. Sir Francis Jeune in holding that the separation agreement afforded no answer to the wife's application for maintenance, rested his decision mainly on the grounds relied upon by Sir James Hannen in *Morrall v. Morrall* (2), which grounds in Sir Francis Jeune's opinion had been approved by the Court of Appeal in the first case of *Gandy v. Gandy*. (3) The learned President stated that it appeared to him that the Court of Appeal in the latter case had laid down that the power given to the Court to vary settlements on a divorce enabled the Court to set aside any previous agreement of the parties for the allowance to the wife and to do complete justice in the matter. For the reasons which I have already stated and which I will not repeat, I am of opinion that none of the grounds upon which Sir Francis Jeune rested his decision in *Bishop v. Bishop* (1) can be supported in view of the decision of the Court of Appeal in the first, *Gandy v. Gandy*. (3)

(1) [1897] P. 138.

(2) 6 P. D. 98.

(3) 7 P. D. 168.

In the Court of Appeal the decision of the learned President in *Bishop v. Bishop* (1) was upheld, but on entirely different grounds. Lindley L.J., who during the respondent's argument had pointed out that the only question was whether upon the construction of the agreement the wife had agreed not to apply for further maintenance (2), delivered the considered judgment of the Court. After clearing up the misunderstanding which appeared to have existed as to the effect of the decision in the second case of *Gandy v. Gandy* (3) upon the decision in the first case of *Gandy v. Gandy* (4), the judgment proceeds to deal with the facts in *Bishop v. Bishop*. (1) It points out that the agreement contained no covenant not to sue for restitution of conjugal rights or for judicial separation or for a divorce; that it appeared from the agreement that the parties contemplated a divorce; that the agreement contained no covenant by the wife not to sue for more than the agreed allowance; and that the agreement provided that the wife should have the child and maintain her out of that allowance. It also points out that as the first case of *Gandy v. Gandy* (4) was a case of judicial separation and not of divorce it was not in point except in so far as it negatived any implied condition of continued chastity and that the case in *Bishop v. Bishop* (1) must turn on the power of the Divorce Court on a dissolution of a marriage to compel a husband to provide for his divorced wife and to make orders for the maintenance and education of the children. After considering the statutory powers conferred on the Court in this respect the judgment proceeds (5): "The appellant contends that all these matters are to be disregarded, and attention is only to be paid to the terms of the separation deed. This cannot be right." The judgment then referred to the express provision that the allowance was to continue even in the event of a future dissolution of the marriage, and stated that the validity of the agreement in this respect was very questionable, and that it was doubtful whether an express covenant not to sue for increased alimony in the

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

(1) [1897] P. 138.

(3) 30 Ch. D. 57.

(2) Ibid. 148.

(4) 7 P. D. 168.

(5) [1897] P. 138, 164.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lawrence L.J.

event of a divorce grounded on future misconduct could be recognized. It stated further that a covenant of such questionable validity certainly could not be implied, and that the wife could not be held to have precluded herself by her agreement from invoking the aid of the Court to obtain further maintenance. It further points out that no agreement between the parents could deprive the Court of its statutory powers relating to the custody, maintenance, and education of children. It then explains that an exercise of the power conferred on the Court to vary settlements would be of no assistance to the wife, and concludes with the statement that the other powers conferred on the Court (which I understand to mean the powers to make an order for maintenance for the wife and for the maintenance and education of the child) were amply sufficient to justify the order which the learned President had made.

In my opinion this case is distinguishable from the present in three essential particulars. First, the agreement contained no covenant by the wife not to sue for further maintenance; secondly, the agreement contained an express provision that the allowance to the wife should continue after the dissolution of the marriage; and, thirdly, the agreement provided that the allowance was to cover the maintenance of the child, whose interests were therefore directly affected.

The decision of the Court of Appeal was in my opinion based entirely upon these three distinguishing features, all of which are absent from the present case.

The Court, when referring to the questionable validity of the provision that the allowance to the wife should continue after the dissolution of marriage, did not in my opinion intend to cast any doubt on the principle that no condition will be implied terminating a covenant absolute in terms on an event not in the contemplation of the parties, whether that event be a divorce or judicial separation or merely unchastity, or on the decisions in such cases as *Goslin v. Clark* (1); *Charlesworth v. Holt* (2); *Fearon v. Earl of Aylesford* (3); and the

(1) 12 C. B. (N. S.) 681.

(2) L. R. 9 Ex. 38.

(3) 14 Q. B. D. 792.

first case of *Gandy v. Gandy*. (1) The judgment in *Bishop v. Bishop* (2) must be read in view of the fact that the Court was there concerned with an *express* provision as to what was to happen in case of a future divorce, which provision, although contained in a valid separation agreement, might in the opinion of the Court offend against public policy as an agreement during marriage designed and framed with the object of regulating the affairs of the spouses on a future dissolution of the marriage, and be void on that ground. In the special circumstances of that case the Court declined to imply a covenant by the wife that she would not sue for further maintenance in the event of a future divorce, the validity of which covenant if expressed in those terms would in the opinion of the Court have been as much open to doubt on the ground of public policy as the express agreement by the husband to pay the allowance after a future divorce.

In the absence therefore of an agreement either express or implied by the wife not to sue for further maintenance, the Court held that the wife was free to apply to the Court and that the Court was free to entertain her application. The only question which then arose was whether the Court, in exercising its power to award maintenance to the wife, was bound by the amount which the husband had agreed to allow to the wife—in other words, whether it was bound to have regard only to the terms of the separation agreement or whether it was free to take into consideration the other matter which the Act requires the Court to have regard to. The Court held that in exercising its powers, which the wife had not by her agreement precluded herself from invoking, it was not fettered by the terms of the agreement, as contended for by the husband, and was not bound to have regard only to the terms of the agreement but could also have regard to the other matters referred to in the Act.

The Court also held that the amount of the maintenance affected the interests of the child, and that this was an additional reason why the wife should not be held disentitled to apply for further maintenance.

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Lawrence L.J.

(1) 7 P. D. 168.

(2) [1897] P. 138.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lawrence L.J.

If the Court had been of opinion or had intended to decide that a wife could not bind herself not to apply for further maintenance in the event of her obtaining a divorce, I find it difficult to understand why the Court did not say so, instead of going into the whole matter and laying such strong emphasis on the absence of an agreement on the part of the wife not to apply for further maintenance, and considering the question whether such an agreement ought to be implied. The short answer to the whole of the arguments advanced on behalf of the husband would have been that the wife could not preclude herself from applying to the Court for maintenance after she has obtained a decree for divorce, and therefore that it was wholly immaterial to consider whether or not she had by the particular agreement in that case purported to do so.

If the view I have expressed as to the effect of the decision of the Court of Appeal in *Bishop v. Bishop* (1) be right, it follows that it does not assist the wife's contention in the present case, which in my opinion falls to be decided on the principles upon which the Court of Appeal acted in deciding the first case of *Gandy v. Gandy*. (2)

In my judgment it is entirely contrary to equitable principles that a wife, after having accepted the benefits of a separation deed, should be allowed to repudiate her obligations under it; whether such repudiation takes place because she has obtained a decree for judicial separation or because she has obtained a decree for divorce, in either event it seems to me that she is both approbating and reprobating the deed, a proceeding which Courts of equity have always set their face against.

In the result, for the reasons which I have stated, I am of opinion that the appeal ought to be allowed, and that the wife's petition for maintenance ought to be dismissed.

HUGHES v. HUGHES.

The facts of this case differ in certain respects from those in *Hyman v. Hyman*.

(1) [1897] P. 138.

(2) 7 P. D. 168.

The spouses were resident in Ireland, and the deed containing the covenant in question was executed to carry out a compromise of proceedings instituted by the wife in the High Court in Ireland for a divorce a mensa et thoro. The Irish Court had no jurisdiction to grant a divorce a vinculo, and the only method by which such a divorce could be obtained whilst the parties were resident in that country was by Act of Parliament. The consideration moving from the husband consisted of an absolute assignment to the wife of a leasehold house. The deed provided that the wife should have the custody and control of the four children of the marriage, of whom, however, two would appear to have been of the age of twenty-one years and upwards, and the remaining two of the respective ages of twenty years and sixteen years. At the date of the divorce in England therefore all the children of the marriage were of full age, and the wife is not on the present occasion seeking to invoke the powers conferred on the Court relating to the custody, maintenance, and education of children.

The covenant by the wife is absolute in terms—namely, that she or any person for her or on her behalf should not, nor would at any time thereafter, commence or prosecute any action or other proceeding for compelling the husband to allow her any support, maintenance, or alimony. There is nothing in the deed to suggest that the parties contemplated a dissolution of the marriage by a decree for divorce, and in the circumstances the proper inference in my opinion is that such an event was not contemplated by either of the parties when the deed was executed. The deed, however, contains provisions relating to the estate of each of the spouses in the event of the dissolution of the marriage tie by the death of the one in the lifetime of the other.

The judgment of the learned President is based entirely upon the construction of the deed. According to the learned President's view the wife's covenant, on the true construction of the deed, lasted only as long as the marriage tie existed and terminated on the dissolution of that tie by a decree for divorce. With the greatest respect for the view thus

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lawrence L.J.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Lawrence L.J.

taken by the learned President I am unable to agree with it. The covenant is absolute in terms and the deed contains no express provision for its termination. The absence of any such provision renders one of the reasons (namely, that based on the maxim "Expressio unius est exclusio alterius") stated in my judgment in *Hyman v. Hyman* for not implying any such provision in the event of a divorce inapplicable to the present case; but I am of opinion that the other reasons expressed in my judgment in that case are equally applicable here; and afford amply sufficient grounds for not making any such implication. Moreover it would in my opinion be more difficult to imply a condition subsequent defeating the wife's covenant in the present case, because such a condition, besides being (as in *Hyman v. Hyman*) inconsistent with the express terms of the deed and with the intention of the parties as gathered from its provisions, ought not to be implied where the husband has performed the whole of his part of the deed.

As appears from my judgment in *Hyman v. Hyman* I have the misfortune also to differ from the learned President's statement that the Lords Justices in *Bishop v. Bishop* did not appear to have doubted that in a case of divorce Sir James Hannen's view in *Morrall v. Morrall* (1) would have been correct.

In my opinion the differences between the facts here and the facts in *Hyman v. Hyman* are not sufficient to prevent the reasons upon which my judgment in the latter case is based from applying to the present case.

It is not disputed that the wife was competent to enter into the covenant. The covenant is absolute in terms and no condition terminating it in an event not in the contemplation of the parties ought to be implied. The wife ought not to be permitted to approbate and reprobate. The covenant is not against public policy and does not constitute an attempt to fetter the discretion of the Court. The Court therefore is not at liberty to disregard the covenant, even although the husband had committed adultery and the wife has obtained a divorce.

(1) 6 P. D. 98.

For the reasons stated in this judgment and in my judgment in *Hyman v. Hyman* therefore I am of opinion that the appeal should be allowed and the wife's petition for maintenance should be dismissed.

C. A.

1928

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

GREER L.J. The question involved in these appeals may be shortly stated as follows.

Is it competent to the parties to a deed of separation between husband and wife to prevent the Court when decreeing a divorce from exercising the jurisdiction conferred by s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, by agreeing that the wife will not prosecute any action or proceeding for compelling her husband to allow her support, maintenance, or alimony?

In stating the question I have used the words contained in the separation deed in *Hughes v. Hughes*. The words used in the separation deed in *Hyman v. Hyman* are not identical but are to the same effect.

It is true that in form the agreements do not purport to limit the powers of the Court, but only restrain the wife from seeking the aid of the Court. The distinction drawn by the appellant between an agreement expressly purporting to limit the powers of the Court and an agreement restraining a litigant from doing that which under the rules of practice is necessary before the Court can exercise its power, has in my opinion no substance. The effect of the covenants in these cases is exactly the same as it would have been if the parties had expressly stipulated that when making a decree of divorce the Court should not have the power to make an order for maintenance. If you lock the door of the Court and take away the key, you prevent the Court from exercising its powers just as effectively as if you leave the door open and agree that when you get into Court, the Court shall not exercise its powers.

Before I deal with the effect of previous decisions I think it useful to call attention to several considerations which appear to be pertinent to the problem we have to solve.

C. A. 1928 HYMAN v. HYMAN. HUGHES v. HUGHES. Greer L.J.	Sect. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, which reproduces the provisions of earlier statutes, does not of its own force require any application for maintenance to be made by the wife, but expressly gives power to the Court "on any decree for divorce," to make an order securing to the wife an annual sum of money, or an order for the payment by the husband of a monthly or weekly sum for her maintenance and support. So far as the statute is concerned, an order for maintenance might be made by the Court on any successful petition for divorce by a wife, whether the wife asked for it or not. But r. 65 of the Matrimonial Causes Rules provides that application for maintenance shall be made by a separate petition. Rules of practice are only machinery to enable the Court to exercise its powers in a manner convenient to the efficient despatch of its business. While the rule remains as it is, if a wife agrees not to petition for maintenance she thereby in effect agrees to deprive the Court of the powers expressly given to it "on any decree of divorce."
---	---

A decree of divorce is in its nature a judgment in rem. It does more than affect the rights of the parties inter se. It alters their status, and profoundly affects their relation to third parties. Before divorce a husband is liable for his wife's torts, he is liable in certain circumstances on her contracts for necessities, and if she becomes a pauper he is liable to recoup to the guardians the expense of her maintenance. Further, though married people can lawfully enter into separation deeds and thereby modify their rights inter se, they cannot by agreement become divorced persons. But when they are duly divorced by the Court they have all the rights and liabilities of unmarried persons, and it is a matter of great public interest that an adequate provision should be made by the Court for the maintenance of the wife and children of the marriage. In giving judgment in *Harriman v. Harriman* (1) Farwell L.J. said: "The Act of 1857 abolished the old ecclesiastical jurisdiction (s. 2) and created a new civil tribunal with new powers, including a

(1) [1909] P. 123, 143.

power to dissolve marriages altogether; but this power, trenching as it did on the binding sanctity of the marriage tie, and affecting, therefore, not only the parties to the suit, but also their children (if any) and society generally, was limited by the Act, especially by ss. 29, 30 and 31."

These observations seem to me in principle to apply just as much to the incidental powers conferred on the Court when granting a decree of divorce, as they do to the limitations imposed on the Court. It is, in my judgment, in the public interest that the Court should be able to secure to the wife such sum by way of maintenance as should seem reasonable, having regard to her fortune, the ability of the husband, and the conduct of the parties, without being restrained by any agreement they have made while they had the status of married persons.

Apart from authority, I should have no hesitation in holding that the Probate Court is entitled to consider in each of these cases under appeal the wife's petition for maintenance, and on the hearing of the petition to grant such sum by way of maintenance as the Court deems reasonable, notwithstanding the wife's covenant in the deed of separation not to ask for any maintenance beyond the sum provided for in the deed. Sect. 190 gives the Court its power to order maintenance, as I have pointed out, "on any decree of divorce," and it is not permissible to read into the section some such words as "unless otherwise agreed by the parties." If the appellants' argument is right, a wife who had agreed to live separate from her husband and to do without maintenance, might unexpectedly find herself without any means when she obtained a decree of divorce, while her husband had meantime acquired a substantial fortune. It would be unfortunate indeed in the interests of justice and in the public interest if the Court could not, under these circumstances, disregard an agreement made under other circumstances, but was thereby disabled from making a reasonable order for the maintenance of the wife, the need for the divorce having been occasioned by the husband's misconduct. But it is said there is authority by which this Court ought to hold

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Greer L.J.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Greer L.J.

itself bound, that a wife who has during the continuance of the marriage bond entered into an agreement in words which are wide enough to include the joint lives of the parties not to seek an order for maintenance, is bound by that agreement after she has obtained a divorce, and the Court cannot grant maintenance at any larger sum than she agreed to accept. In my opinion there is no binding authority for this proposition, and the weight of authority is the other way.

The appellants relied chiefly on the decisions in *Charlesworth v. Holt* (1) and *Gandy v. Gandy*. (2) In *Charlesworth v. Holt* (1) it was held that the trustees of a separation deed in which the husband covenanted to pay an annuity to the trustees for the wife's support during their joint lives and so long as they should continue to live separate and apart, were liable on the deed, notwithstanding the fact that the wife had been divorced by her husband. The point was raised by demurrer to a plea by the defendant setting up as a defence to a claim by the trustees for money due under the deed, the wife's subsequent adultery, and the dissolution of the marriage. The Court held the plea bad, as there were no express words limiting the husband's obligation to the period during which the marriage subsisted. I think this case is an authority for the proposition that a covenant such as there was in the separation deeds under consideration in these appeals, is to be construed as applying between the parties after a divorce on the ground of adultery. This was not a decision of a Court of Appeal, and would not be binding on this Court if it were a recent case, but it was decided nearly fifty-five years ago, and many deeds of separation must have been entered into since then upon the assumption that a covenant in a separation deed to pay or accept an agreed sum for maintenance would be construed as applying between the parties after a divorce in the absence of any order made by the Divorce Court under its statutory powers. The case was not cited to the learned President in *Hughes v. Hughes*—if it had been he might possibly have given a different reason for his judgment than that which appears

(1) L. R. 9 Ex. 38.

(2) 7 P. D. 168.

in the transcript. I think this Court would hesitate for a long time before it overruled a case which was decided so long ago as was *Charlesworth v. Holt*. (1) But the case has no bearing on the question we have to decide in these appeals, which are concerned not so much with the construction of the covenants in the deed, as with the extent of the powers conferred by statute on the Court when decreeing a divorce.

In *Gandy v. Gandy* (2) it was held that a covenant by a wife in a separation deed not to sue for increased alimony beyond that provided for by the deed was binding on her, notwithstanding the fact that the husband had committed adultery, and that she had obtained a decree for judicial separation. Sir George Jessel M.R. and Lindley L.J. expressly distinguished the case, which was one of judicial separation, from a case arising on the dissolution of a marriage. The subsequent history of the *Gandy v. Gandy* (3) litigation is peculiar, and I doubt whether even in a case of judicial separation, *Gandy v. Gandy* No. 1 (2) can now be regarded as an authority. The parties came before the Court of Appeal again (3), and as a result of the situation created by the fact that the husband contended that having by the decree of the Court lost the custody of his children, he was no longer liable to pay for their maintenance and education, the Court gave the wife liberty to apply again to the Divorce Court for increased alimony, and adjourned the hearing of the appeal until she had done so. The subsequent history of the case is stated by Gorell Barnes J. in *Judkins v. Judkins*. (4) On the wife's second application for maintenance the President allowed her permanent alimony at the rate of 750*l.* per annum, being 500*l.* more than the amount agreed in the separation deed, credit to be given for the annual payment made under the deed. A final order was then made by the Court of Appeal, staying the Chancery proceedings. Gorell Barnes J. concludes his account of the *Gandy v. Gandy* (3) litigation in these words: "The result of all this litigation in *Gandy v. Gandy* (3) was that the wife obtained

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Greer L.J.

(1) L. R. 9 Ex. 38.

(3) 30 Ch. D. 57.

(2) 7 P. D. 168.

(4) [1897] P. 138, 149, 155.

C. A. about 500*l.* a year more than the deed gave her as permanent
 1928 alimony. I cannot ascertain exactly how this increase was
 fixed; but it may have been in order to maintain the two
 youngest children. At the same time the final order does in
 terms give permanent alimony beyond that which was
 covenanted to be paid by the deed."

HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.
 Greer L.J.

Gandy v. Gandy (1), therefore, cannot be regarded as an authority that even in a case of judicial separation the Court cannot under any circumstances override the agreement of the parties as to the amount to be paid for maintenance. The second case of *Gandy v. Gandy* (2) did not, as was suggested by the appellants' counsel, depend on the wife being freed from her contract by the husband's repudiation of it. A contention by a party to a contract that his liability to make a payment under the contract has come to an end, is not a repudiation of the contract. Be this as it may, *Gandy v. Gandy* (1) has, in my judgment, no application to the case where the marriage is dissolved by a decree of divorce. Whatever proposition of law can be extracted from it only applies to a case of judicial separation, and it ought not to be applied to the wholly different situation created by a divorce. The decisions of Sir James Hannen in *Morrall v. Morrall* (3) and of Sir Francis Jeune and the Court of Appeal in *Bishop v. Bishop* (4) were given in cases where there was a decree of divorce, and they afford ample authority for deciding these appeals in the respondents' favour. The law, in my opinion, is correctly stated by Sir James Hannen P. in *Morrall v. Morrall* (3) in these words: "Circumstances now justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit and amongst them to an allowance based upon her husband's actual income."

The wife's covenant in *Morrall v. Morrall* (3) was that she would not at any time thereafter commence or prosecute any suit or other proceeding for compelling her husband to allow her any support or maintenance or alimony whatsoever,

(1) 7 P. D. 168.

(2) 30 Ch. D. 57.

(3) 6 P. D. 98.

(4) [1897] P. 138.

except the sum provided for in her separation deed. The Court held for the reasons stated that the deed afforded no answer to a petition for maintenance. The case was mentioned without dissent by Cotton and Lindley L.JJ. in the first *Gandy v. Gandy* (1) case in the Court of Appeal. It was cited to the Court of Appeal in the argument in *Bishop v. Bishop* (2), but no observations were made about it in the judgment.

C. A.
1928

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Greer L.J.

In *Bishop v. Bishop* (2) at the trial of a petition for divorce, the parties consented to have the petition dismissed, the petitioner agreeing to accept 130*l.* per annum by way of maintenance, to include the maintenance of the child, of which she was to have the custody. There was no express covenant not to sue for further maintenance, but in my opinion the agreement must be construed in the same way as covenants relating to permanent maintenance in separation deeds, and apart from any order made by the Court on a dissolution of the marriage, the petitioner would have been bound by her promise to accept 130*l.* per annum by way of permanent maintenance, and could not have sued for anything more. When the petitioner, having obtained a decree of divorce, asked for an order for more than 130*l.* per annum, Sir Francis Jeune P. held that the agreement did not afford any answer to her petition, and his judgment was upheld by the Court of Appeal. It is quite clear that the Court of Appeal considered that though the agreement contemplated the continuation of the agreed allowance, and consequently of the obligation of the wife to accept it, in the event of a future dissolution of the marriage, they thought that the Court had power to override that agreement and award her a larger allowance, if, when the petition came on for hearing, it was considered reasonable on the grounds mentioned in s. 190 that she should have permanent maintenance at a higher rate than she had agreed to accept. It seems to me to follow that if the Court has power to award to a wife a higher allowance than that which she has agreed to accept, it has also power to consider her petition and make

(1) 7 P. D. 168.

(2) [1897] P. 138.

C. A. a proper order for maintenance, notwithstanding her agree-
1928 ment that she will not ask for such an order.

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.

For these reasons, and those stated in the judgment of Scrutton L.J., I think the judgments appealed from were right, and the appeals should be dismissed with costs.

SANKEY L.J. The parties in *Hyman v. Hyman* were married upon September 14, 1912, and there are no children of the marriage. On September 19, 1919, they agreed to live apart, and by a deed of separation made between them on that date the husband covenanted for himself, his executors and administrators to pay sums of 200*l.* and 2000*l.* down and a further sum of 20*l.* a week during the life of his wife, and further it was provided that neither the wife "the said May Hyman nor any person on her behalf shall at any time hereafter molest or disturb the said Maurice Percy Hyman by any means, either by taking out citation or process or instituting any action in England or elsewhere or in any other manner compel the said Maurice Percy Hyman to cohabit with her or endeavour to enforce any order for restitution of conjugal rights, or to compel the said Maurice Percy Hyman to allow her any alimony or maintenance further than the said weekly sum of 20*l.* and the aforesaid sums of 200*l.* and 2000*l.*" On January 11, 1926, the wife petitioned for a divorce and obtained a decree nisi on January 25, 1927, which was made absolute on February 27, 1928. On February 7, 1927, the wife brought a petition for maintenance, to which, on April 28, the husband delivered an answer, relying upon the above mentioned covenant as a defence to the petition. Subsequently an issue was directed to be determined whether or not the said petition should be dismissed on the ground that any proceedings taken by the wife were a breach of the said covenant. In that issue the husband was made plaintiff, and the learned judge, following a decision of the President in the case of *Hughes v. Hughes*, decided in favour of the defendant, and held that the covenant did not prevent her bringing her petition. From that decision the present appeal is brought.

Two points are taken by the respondent: (1.) that the words of the covenant do not cover the present case and do not estop the wife; (2.) that if the words do cover the present case, the covenant is illegal and cannot be relied upon, as there is no power to contract out of the Act of Parliament—namely, s. 190 of the Judicature (Consolidation) Act, 1925, which empowers the Divorce Court if it thinks fit, on any decree for divorce or nullity of marriage, to order that the husband shall secure to the wife such gross sum of money or annual sum of money as the Court may deem to be reasonable. In the case of *Hughes v. Hughes*, the President, on the construction of a somewhat similar covenant, said: “The decisive question here is whether the present applicant has covenanted not to do what she now seeks to do. In my opinion, she has not. She covenanted, as a wife, against making, as a wife, any claim upon her husband for support, maintenance or alimony, that is to say, she covenanted not to proceed in a Court having jurisdiction in such matters, to require as against her husband the provision for her livelihood for which in his marital capacity he would during their marriage *prima facie* be liable. She is not so proceeding. She is no longer a wife.” Before dealing specifically with the above two points, it will be convenient to examine the statutes and decided cases applicable to them.

Originally the law relating to matrimonial causes was largely dealt with by the Ecclesiastical Authorities and Parliament, but in 1857, by the Matrimonial Causes Act of that year, a Court was constituted with exclusive jurisdiction over matters matrimonial in England and is known as the Divorce Court. The Act created two new remedies. By s. 7 powers were given to the Court to pronounce a decree for judicial separation in lieu of the old decree for a divorce *a mensa et thoro*, and by s. 17 further powers were given where the application was by the wife to make any order for alimony which should be deemed just. By s. 31 powers were given to the Court to pronounce a decree for dissolution of marriage, and by s. 32 the Court was further empowered

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Sankey L.J.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Sankey L.J.

to grant alimony. An examination of the statutes will show that at the very beginning a clear line was drawn between the rights to obtain and the results of obtaining the said two remedies. The reason is not far to seek. In the case of judicial separation the marriage tie was not broken; in the case of divorce it was, and it is not difficult to understand why, under such circumstances, such a difference should have been made between the two.

Whether certain situations were overlooked in the new venture of 1857, or whether it became the policy of Parliament to increase the jurisdiction in divorce, is a question upon which it is not necessary to speculate; but certainly the jurisdiction in divorce, as distinguished from the jurisdiction in judicial separation, was from time to time enlarged.

By the Matrimonial Causes Act of 1859, s. 5, power was given to the Court to inquire into the existence of ante-nuptial or post-nuptial settlements in cases of nullity of marriage or dissolution of marriage. Sect. 4 of that Act, when dealing with the custody of children, included cases of judicial separation, nullity of marriage, or dissolution of marriage. Sect. 3 of the Matrimonial Causes Act, 1878, again enlarged the jurisdiction of the Court by making s. 5 of the Act of 1859 applicable, notwithstanding there were no children of the marriage.

It will thus be seen that from time to time the distinction between judicial separation and divorce was preserved, and the jurisdiction of the Court in the latter enhanced. It is not therefore surprising that in the cases from time to time decided, the Courts should not only draw a distinction between judicial separation and divorce, but should act upon such a distinction in coming to their decisions.

After several re-enacting statutes, the law was consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925. It may perhaps be a little unfortunate that the sections dealing with alimony in judicial separation and divorce were not kept entirely separate but were, possibly for the sake of convenience, thrown together in s. 190, although in different sub-sections; but that does not alter

the distinction which still remains and which is fundamental, that the remedies and the results of the remedies are entirely different and proceed on entirely different bases—namely, in one the continuance, and in the other the dissolution of the marriage.

I now turn to the cases. There have been decisions not only in the Divorce Court, but in the Courts of Chancery and the Courts of common law; but speaking for myself I think those two latter Courts should be extremely cautious in doing anything to interfere with the practice of the Divorce Court, which for many years has had peculiar jurisdiction and large experience in cases arising between husband and wife.

Normally in suits coming before the Chancery or King's Bench judges, the Court is considering only the rights of the parties inter se. The Divorce Court is dealing with changes in the status of the parties, and considerations of public and national interest arise. In ordinary cases before a Chancery or King's Bench Court a defendant is at liberty to consent to judgment for the plaintiff with costs; no such liberty is permitted to a respondent in a divorce case, indeed, collusion is an absolute bar to a dissolution of marriage. We were much pressed by the learned counsel for the appellant with the case of *Charlesworth v. Holt*. (1) There, by a separation deed, the defendant covenanted with trustees to pay them an annuity for his wife's support during their joint lives, and so long as they should live separate and apart. In an action by the trustees for arrears of the annuity it was held that a plea setting forth the deed and alleging the wife's subsequent adultery and the dissolution of the marriage in consequence was bad, there being no express words limiting the defendants' obligation to the period during which the marriage tie subsisted. That case was not cited to the learned President, but it is to be observed that it was a suit by the trustees. The decision is not binding on this Court, and it is no authority upon the question whether the Divorce Court has or has not jurisdiction in such a case as the present. It

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Sankey L.J.

(1) L. R. 9 Ex. 38.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Sankey L.J.

is a decision of a Court of common law, and moreover, in my view, that case would even in a Court of common law be differently decided now, having regard to the decisions in the Coronation and Frustration cases. Two decisions of the Court of Chancery may be referred to. *Besant v. Wood* (1), where Sir George Jessel M.R. expresses the opinion that a married woman may compromise by agreeing to live separate on terms as regards maintenance for herself, although he adds that that contract, like all other contracts, if not against public policy, is one which may be upheld and enforced; and *Gandy v. Gandy* (2), which is a sequel to the other case of *Gandy v. Gandy*. (3) As some criticism was made in the course of the appellants' argument with regard to the phrase "variation of settlement," in reference to s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, when considering the gradual increase of the power of the Divorce Court, I should point out that Sir George Jessel said in *Gandy v. Gandy* (3) in the Probate Division that the Legislature has not thought fit in the case of judicial separation to give the same powers to the Court that it has given in the case of dissolution of marriage. The headnote of the report of *Gandy v. Gandy* (3), where it says that the Court has not, as it had in the case of a decree for dissolution, power to alter the separation deed, possibly goes too far, but I do not propose, however, to dwell long upon that case. It was a case where judicial separation and not divorce was involved, and I cannot help thinking that the Court of Appeal, when it gave its decision (3), did not contemplate the facts which were presented to them when it gave its decision three years later. (2) It is sufficient to refer to Lindley L.J.'s explanation of it in *Bishop v. Bishop*. (4) I pass over other cases not connected with divorce, because, as it appears to me, the considerations which apply to divorce are different—namely, *Marshall v. Marshall* (5), which was a suit for restitution of conjugal rights, as also was *Tress v. Tress*. (6) The case of

(1) 12 Ch. D. 605, 622.

(2) 30 Ch. D. 57.

(3) 7 P. D. 168, 172.

(4) [1897] P. 138, 162.

(5) 5 P. D. 19.

(6) 12 P. D. 128.

Aldridge v. Aldridge (1) was, it is true, a nullity case, but in nullity the marriage is not void, but only voidable at the instance of the aggrieved party.

Passing to a case which is concerned with divorce, *Morrall v. Morrall* (2) would appear to be a decision in favour of the respondent in the present case, although I cannot help thinking that the reasons given by Sir James Hannen were ones which have been disapproved by the Court of Appeal, and a similar remark applies to the decision of *Benyon v. Benyon*. (3)

I doubt, however, if it is possible to say that there can never be a case where a change of circumstances would operate to induce the Court to declare a deed is no longer binding. Finally it is necessary to refer to the case of *Bishop v. Bishop*. (4) It is true that the covenants in that case and the case of *Judkins v. Judkins* (4) were rather different from the covenant now under consideration, there being no express covenant by the wife not to sue for increased alimony in the event of a divorce decree grounded on future misconduct in the one case and no covenant by the wife not to sue for an increase in the other; but the reasoning in those two cases is in favour of the respondents in the present case.

To sum up, a review of the authorities leads me to the conclusion that the point to be decided is an open one and comes before this Court for the first time. There are dicta in the cases which can doubtless be relied upon by either side, although it appears that the Divorce Court has always struggled to maintain what Parliament had undoubtedly given it—namely, a large and unfettered power to decree alimony in divorce cases.

I now pass to the two points which fall for decision: (1.) Does this covenant cover the present case? Speaking for myself, I agree with the President's reasoning in *Hughes v. Hughes*, that the covenant does not apply in the present circumstances. In my view, it only operates as long as the

C. A.
1928

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Sankey L.J.

(1) (1888) 13 P. D. 210.

(3) 1 P. D. 447.

(2) 6 P. D. 98.

(4) [1897] P. 138, 149.

C. A.
1928

HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Sankey L.J.

relationship of husband and wife exists between the parties ; but the decision in *Charlesworth v. Holt* (1) may make it difficult to decide the matter upon this ground, although I think it is correct. I therefore turn to the second point. (2.) Was there a power to contract out of this Act of Parliament ? If not, the clause is invalid. Now the covenant must be strictly construed. It is not, nor indeed can it be, a covenant not to petition for a divorce. It is a covenant that the divorce judge, in the event of the wife coming before him for a divorce, shall not have the powers which Parliament says he is to have in such cases. It does not indeed go so far as to say that he may hear the case but not determine it, but it does seek to prevent the judge exercising those powers which Parliament says he is to have when pronouncing a decree, and without which it does not appear to me that he can do justice between the parties. It is not logical that he should be bound, when he decrees a divorce, by stipulations agreed between the parties as applicable to and binding under entirely different circumstances, neither is it in my opinion permissible for the parties to a contract to say that the judge shall be so fettered in his discretion. It is impossible to fetter the discretion where there are children of the marriage—divorce, children, alimony are inextricably mixed up together, and the jurisdiction of the Divorce Court refers to delicate matters which cannot be treated as you would treat a contract for the sale of goods, or a suit for specific performance. As above pointed out, the parties to a marriage contract are not at liberty to do as they like with regard to the contract. There are public and national interests to be considered. The cases on public policy are conveniently collected in *In re Hope Johnstone* (2), where the learned judge quotes Wood V.-C. in *H. v. W.* (3) as saying : “ It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.” Over and above that I read Lindley L.J. as saying in *Bishop v. Bishop* (4) : “ We are not

(1) L. R. 9 Ex. 38.

(2) [1904] 1 Ch. 470, 474.

(3) 3 K. & J. 382, 387.

(4) [1897] P. 138, 164.

aware of any authority since the Divorce Act which shews that a covenant by a husband or wife not to sue the other for a divorce grounded on future misconduct is valid, and we doubt whether an express covenant not to sue for increased alimony in the event of such a divorce could be recognised."

In my view, a consideration of the statutes, coupled with the doubts expressed by Lindley L.J., clearly point to a covenant of this character being invalid, and it is impossible for parties so to contract out of this Act of Parliament.

I can see no distinction in law between this case and that of *Hughes v. Hughes*, and both appeals should, I think, be dismissed with costs.

RUSSELL L.J. These two cases raise for determination the same point, which may thus be stated: Is a contract by a wife (made at arm's length and for valuable consideration) by which she agrees not to take proceedings to compel her husband to allow her support, maintenance or alimony, or to allow her any alimony or maintenance beyond a stipulated amount, binding upon the wife after she has obtained a decree absolute for divorce; or is it still open to her to petition for maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925?

The facts in the two cases under appeal are not quite the same and must be separately stated. I will deal first with *Hughes v. Hughes*. In *Hughes v. Hughes* there had been a separation deed executed by the spouses on June 8, 1904, by which the husband covenanted to pay to the wife an annual sum of 50*l.* for her separate use without power of anticipation; and the husband had charged one moiety of the annual sum on certain leasehold property known as "Elsinore" at Dalkey held by him for a long term of years. That deed contained a covenant by the wife not to commence any proceedings for compelling the husband to allow her any support, maintenance or alimony except the said annual sum of 50*l.* In 1920 the wife filed a petition in the High Court of Justice in Ireland for a decree of divorce *a mensa et thoro*. The parties came to terms. By those terms the

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Sankey L.J.

C. A. parties agreed that the petition should be discontinued,
1928 and that they should continue to live separate, and that in
consideration of the husband assigning (which he did) to
HYMAN the wife the property known as "Elsinore," the wife would
v. HYMAN. execute the indenture next stated and enter into the covenants
HUGHES therein contained. By that indenture (which is dated
v. HUGHES. November 15, 1920) the wife purported to release the husband
Russell L.J. from the annual sum of 50*l.*, and she covenanted with the
husband that she "or any person for her or on her behalf
shall not nor will at any time hereafter commence or prosecute
any action or other proceedings for compelling the said
George Edgar Hughes . . . to allow her any support
maintenance or alimony." In other words, the wife, on the
one hand, obtained "Elsinore"; on the other hand, she
purported to give up for all time all right to any support
maintenance or alimony. On September 26, 1926, the wife
presented a petition for divorce in this country based on
adultery by the husband committed subsequently to the
Matrimonial Causes Act, 1923. A decree nisi was pronounced
on May 4, 1927, which was made absolute in the following
November. On November 15, 1927, the petitioner presented
a petition for maintenance under s. 190, sub-s. 1, of the Act
of 1925. The respondent on January 6, 1928, issued a
summons asking for a stay of all proceedings on that petition
by reason of the provisions of the indenture of November 15,
1920. On February 10, 1928, an order was made dismissing
the petition for maintenance, but on appeal to the President
an order was made by him on March 26, 1928, rescinding the
order of February 10, 1928, and directing that the petitioner
be at liberty to proceed on her petition for maintenance.
It is from that order of the President that the respondent
appeals to this Court asking that it be rescinded and that
the order of February 10 be restored.

The judgment of the President, as I read it, disposed of
the matter on one short ground which he described as the
"decisive question." He held that the petitioner in applying
for maintenance was committing no breach of her covenant,
because the covenant only related to a claim by her as a wife

against the covenantee as her husband. It is true that he proceeds then to refer to *Morrall v. Morrall* (1) and *Bishop v. Bishop* (2) as not weakening the petitioner's right to apply under s. 190; but his decision rests, I think, entirely upon the view that the covenant ceases to apply after the relationship of husband and wife has come to an end. I am unable to take this view. The words of the covenant contradict it; the bargain is that she will not "at any time hereafter" commence proceedings, and the benefit which she obtains in substitution is the assignment of property to be enjoyed by her at all times thereafter whether the relationship of husband and wife continues or not to exist. Nor is there any ground for the view that the indenture of November 15, 1920, is of such a nature that all its provisions automatically cease to operate in the event of a dissolution of the marriage. It is a deed of separation, and *Charlesworth v. Holt* (3) is sufficient authority to show that, in the absence of express words in the deed, liability under a covenant contained therein survives the dissolution of the marriage of the parties to the deed. See also the decision of this Court in *Clifford v. Clifford*. (4) In my opinion the judgment of the President cannot be supported upon what I conceive to be its sole foundation.

There remain, however, for consideration certain other important contentions which were urged in argument. It was said that even assuming that the petitioner's application for permanent maintenance was a breach of the covenant, her covenant did not bind her by reason of the fact that she had obtained a decree for divorce founded upon the respondent's adultery subsequent to the date of the deed. Further it was said that the covenant was bad as being a covenant against public policy; this upon the theory that a covenant by a wife in a separation deed not to ask at any time thereafter for further maintenance or support is either an agreement entered into in contemplation of divorce, or is equivalent to a licence to the husband to commit adultery. To deal with these points requires an examination of certain relevant authorities.

C. A.

1928

 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.
 —
 Russell L.J.

(1) 6 P. D. 98.

(3) L. R. 9 Ex. 38.

(2) [1897] P. 138.

(4) 9 P. D. 76.

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Russell L.J.

In *Gandy v. Gandy* (1) the precise point arose in the Court of Appeal in connection with a decree for judicial separation. In the Court below (2) the President (Sir James Hannen) had decided that a wife who had obtained a decree for judicial separation by reason of adultery committed by her husband subsequently to the execution of a separation deed, was not bound by a covenant therein contained. The covenant was a covenant by the trustees with the husband that the wife would not nor any person on her behalf thereafter commence any proceedings against the husband for alimony except as aforesaid: that is to say beyond 25*l.* per annum, which the husband had covenanted to pay to the trustees during the life of the wife for the use of the wife and two of her daughters. The President held that notwithstanding the deed the wife could apply for and obtain permanent alimony under 20 & 21 Vict. c. 85, s. 17. The grounds of the decision appear to have been (1.) that the subsequent adultery created a state of facts not in the contemplation of the parties at the date of the deed; (2.) that the subsequent adultery deprived the husband of the right to have the restraining provisions enforced; (3.) that the deed should be construed as an agreement to live apart in chastity; and (4.) that any other decision would be prejudicial to morality as holding that the husband obtained by the deed a licence to commit adultery, without subjecting himself to any liabilities beyond those imposed by the deed. Sir James Hannen decided *Gandy v. Gandy*. (2) in the year 1882. Before that he had already decided two cases of a somewhat similar nature—namely, *Benyon v. Benyon* (3) in 1876 and *Morrall v. Morrall* (4) in 1881. *Benyon v. Benyon* (3) is not very relevant here. It was a case where the Court exercised the powers which are now contained in ss. 192 and 193 of the Act of 1925 in favour of a husband and child. There was no covenant by the husband not to apply for more than the allowance provided by the separation deed. *Morrall v. Morrall* (4), however, is of great importance, because Sir James Hannen there decided that a covenant in a separation

(1) 7 P. D. 168.

(3) 1 P. D. 451.

(2) 7 P. D. 77.

(4) 6 P. D. 98.

deed not to sue for further maintenance was not binding upon a wife who had obtained a decree of divorce founded on the husband's incestuous adultery committed after the date of the deed. In deciding both *Morrall v. Morrall* (1) and *Gandy v. Gandy* (2), Sir James Hannen acted upon the view that subsequent adultery by the husband created a new state of facts which deprived him of the right to enforce the covenant not to sue. There was no appeal in *Morrall v. Morrall*. (1) In *Gandy v. Gandy* (2), however, the husband appealed; and as I read the judgments in the Court of Appeal (3), the grounds upon which Sir James Hannen based his decisions in *Morrall v. Morrall* (1) and *Gandy v. Gandy* (2) can no longer stand. Sir George Jessel and Cotton L.J. and Lindley L.J. all agreed that the subsequent adultery of the husband did not deprive him of the benefit of the stipulation as to alimony. In particular Cotton L.J. uses (4) the following language: "But the learned judge seems to have decided the matter on principles that would lead to the conclusion that the deed was bad altogether at law (which it is not), because he said this deed must be read as containing an implied condition that it shall be operative so long as the parties shall live chastely, and that to hold that the present appellant was right would be to say that this deed contemplated and allowed adultery on the part of the husband. I cannot agree with such a conclusion"; and Sir George Jessel (5) expresses himself thus: "I see that the learned judge put it on the ground of public policy. I have explained more than once, and especially in a case which has been referred to by the learned judge himself of *Besant v. Wood* (6), that there is no reason more dangerous to give, and no reason on which such difference of opinion exists, as public policy. He has said: 'If you do not allow the wife to ask for increased alimony in such a case as this, you allow the husband to commit adultery with impunity.' I am by no means prepared to say that this remark is correct. It is not impunity merely because

C. A.

1928

 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.
 ———
 Russell L.J.

(1) 6 P. D. 98.

(2) 7 P. D. 77.

(3) 7 P. D. 168.

(4) 7 P. D. 174.

(5) Ibid. 172.

(6) 12 Ch. D. 605.

C. A. 1928
 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.
 Russell L.J.

he is not obliged to pay more money. I do not consider that payment of alimony is the only punishment for adultery if the word 'punishment' should be used in connection with it. No doubt he may be to some extent relieved from that liability, but the contract is one by which he is compelled to pay an amount having regard to his then state of fortune which might have been much larger then than at the date of the decree for separation, for his fortune might have diminished instead of increasing. It appears to me a very strong thing to say that by his committing an act which does not affect the wife either directly or indirectly her rights to participate in his fortune should be altered." It is true that reference is made in the judgments to the fact that the case was one of judicial separation and not of dissolution of marriage; but the object of such references appears from the context to be to point out that in the event of divorce the Court has powers in regard to settlements (which include separation deeds) which would be unaffected by any stipulations between the spouses as to alimony or maintenance. These powers (which are those now included in s. 192 of the Act of 1925) are not however either available or relevant in either of the cases now under the consideration of this Court.

A somewhat similar matter arose later for consideration in the Court of Appeal in the case of *Bishop v. Bishop*. (1) That case resembled the present ones in that the marriage had been dissolved; it differed from the present cases, however, in that in *Bishop v. Bishop* (1) there was no covenant not to apply for further maintenance. The facts were as follows: The wife had petitioned for divorce, but compromised the proceedings by an agreement dated March 20, 1894, which ran thus: "The petitioner agrees to accept 130*l.* per annum by way of permanent maintenance, this sum to include the maintenance of the child. The said allowance to be paid by Mr. Walter Harry Bishop, the respondent, by monthly payments during their joint lives. This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved. Mrs. Edith Bishop,

(1) [1897] P. 138.

the petitioner, is to have the custody of the child." It was an agreement that a certain sum should be payable for permanent maintenance during the joint lives, to include maintenance of the child, and to be payable even after a divorce. In July, 1895, the wife filed a petition for divorce, and obtained a decree nisi which was made absolute on June 8, 1896. She then applied for (1.) permanent maintenance for herself, and (2.) provision for the maintenance and education of the child. Sir Francis Jeune allowed the matter to proceed, apparently taking the view that the decision in *Gandy v. Gandy* (1) had been virtually set aside by the later decision of the Court of Appeal in *Gandy v. Gandy* (2), and also that the decision in *Gandy v. Gandy* (1) in substance approved of the decision of Sir James Hannen in *Morrall v. Morrall*. (3) In the Court of Appeal (4) the nature and scope of the earlier *Gandy v. Gandy* (1) decision is stated. It is made quite clear (1.) That the Court of Appeal had never gone back from that decision (see p. 161); (2.) that the reason why an order for increased alimony was eventually made was that the subsequent repudiation by the husband of his obligations under the separation deed had freed the wife from her covenant not to sue (see p. 161); (3.) that apart from special cases relieving the wife from her covenant the Divorce Court had no power to disregard it (see p. 162); (4.) that nothing was decided in *Gandy v. Gandy* (1) respecting the statutory powers of the Divorce Court in suits for dissolution of marriage or as to the power to make orders respecting the custody, maintenance, and education of children. The actual decision in *Bishop v. Bishop* (5) was that the appeal from Sir Francis Jeune's order be dismissed, but not at all upon the grounds upon which he based his decision. As I read the judgment of the Court of Appeal in *Bishop v. Bishop* (5) its foundation is this: there was no covenant by the wife not to sue, nor could such a covenant be implied. In no view could the agreement preclude an application on behalf of the child. *Gandy v. Gandy* (1) (being a case of judicial

C. A.

1928

HYMAN
v.
HYMANS
HUGHES
v.
HUGHES.
—
Russell L.J.

(1) 7 P. D. 168.

(3) 6 P. D. 98.

(2) 30 Ch. D. 57.

(4) [1897] P. 138.

(5) [1897] P. 138, 163, 164, 165.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Russell L.J.

separation) was not in point except in one respect. The case must turn solely (there being no covenant not to sue) on the powers of the Divorce Court on dissolution to compel a husband to provide for his former wife, and to make orders for the maintenance and education of the children. As regards the former, these were not fettered by the existence of the Bishop agreement, i.e. the mere fact that the parties had in the separation agreement fixed a figure as being the proper sum, to cover the future, could not prevent the Court from having regard to the wife's fortune, the husband's ability and the conduct of the parties, and if deemed proper fixing a different and higher sum. As regards the latter powers, no agreement between the parents could deprive the children of the benefit of the Court's jurisdiction. That in my opinion is the foundation of *Bishop v. Bishop*. (1) In other words, the only decision in *Bishop v. Bishop* (1) is that where there is no bargain for value by the wife releasing her personal rights under the statute to permanent maintenance, those rights are not destroyed by a separation deed which fixes a sum for maintenance and provides that it shall be payable even after divorce. It was argued before us that *Bishop v. Bishop* (1) covered the present cases, because the agreement in *Bishop v. Bishop* (1) was so worded as to involve an agreement by the wife not to apply for further maintenance. To say this is to shut one's eyes to the language used in the judgment. The case is expressly stated to be decided upon the footing that no such agreement by the wife express or implied did exist. The words at pp. 164 and 165 are explicit. "There is no express covenant to that effect in the present case; and a covenant of such very questionable validity certainly cannot be implied. In other words, the wife cannot be held to have precluded herself by her agreement from invoking the aid of the Court to obtain further maintenance in the events which have happened." Unless the English language bears some meaning unknown to me, there is no decision in *Bishop v. Bishop* (1) that such a bargain as I have mentioned above is or would be unenforceable against the wife after a divorce.

(1) [1897] P. 138.

There is no doubt a suggestion (at p. 164) that such an agreement may be invalid. This suggestion is, however, only an obiter dictum, with which I will deal hereafter. For the moment I am content to say that *Bishop v. Bishop* (1) leaves us free in our consideration of the present case.

The really relevant authorities for the decision of the present case are *Morrall v. Morrall* (2) and the first *Gandy v. Gandy* (3); for it appears to me that while the appellants cannot succeed unless the former case is overruled, the respondents must fail unless *Gandy v. Gandy* (3) is either departed from or distinguished. The grounds upon which the first *Gandy v. Gandy* (3) was decided, destroy completely the foundations upon which *Morrall v. Morrall* (2) was built. Sir James Hannen had relied upon the same line of reasoning as appears to have influenced him in *Gandy v. Gandy* (3). The judgment in *Morrall v. Morrall* (2) is meagre, but it rests only on change of circumstances—namely, misconduct by the husband subsequent to the separation deed with the four alleged consequences which I have enumerated earlier as the grounds of the decision in *Gandy v. Gandy* (3). *Morrall v. Morrall* (2) was cited and considered by the Court of Appeal in the first *Gandy v. Gandy* (3), with the result that it was stated to be a decision which might be supported only upon the ground that the husband's conduct (namely, incestuous adultery) was such as to amount to repudiation by him of the whole contract. I confess that I feel difficulty in justifying the decision upon that ground. *Morrall v. Morrall* (2) was again cited to the Courts in *Bishop v. Bishop* (1), but although Sir Francis Jeune had said in his judgment that the Court of Appeal in *Gandy v. Gandy* (3) had approved of *Morrall v. Morrall* (2), the Court of Appeal in *Bishop v. Bishop* (1) maintained an eloquent silence in regard to that decision. I cannot find that *Morrall v. Morrall* (2) has ever in terms been approved in this Court. On the other hand, although the reasons for the decision have been disapproved, the decision itself has not been over-

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Russell L.J.

(1) [1897] P. 138.

(2) 6 P. D. 98.

(3) 7 P. D. 168.

C. A. ruled. The truth is that the identical case (namely, a
 1928 covenant in a separation deed not to sue for further
 maintenance followed by divorce) has not arisen in this
 Court until to-day. It now arises and must be decided; but
 we are unfettered as to *Morrall v. Morrall* (1) if we think
 it ought to be overruled.

HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.
 Russell L.J.

The authority which does bind this Court is the first
Gandy v. Gandy (2), and unless it can be distinguished on
 some material point it governs the present case. The out-
 standing point of distinction is of course that in *Gandy v.*
Gandy (2) the marriage had not been dissolved. I deviate
 for a moment to deal with a point raised in the argument.
 It was stated or suggested that in some way the authority
 of the first *Gandy v. Gandy* (2) had been overruled or dis-
 credited or shaken by the decision of the Court of Appeal
 in the later *Gandy v. Gandy*. (3) This theory has cropped
 up here and there in judgments of various Presidents, but
 I thought that it had been disposed of for ever by the judg-
 ment of the Court of Appeal in *Bishop v. Bishop*. (4) What
 happened seems reasonably clear. Having held his wife to
 her covenant by the first decision, the husband subsequently
 refused to make payments for the maintenance of the
 children. Rightly or wrongly the Court of Appeal in the
 second *Gandy v. Gandy* (3) considered that this refusal by the
 husband operated to release the wife from her obligation not
 to sue, and they made an order in the following terms: "It
 now appearing that the husband declines to contribute to the
 maintenance and education of the two youngest children,
 stay the proceedings under the judgment of Vice-Chancellor
 Bacon till further order, with liberty to the wife, if she is so
 advised, to present a fresh petition to the Divorce Court
 for increased alimony, with liberty to either side to apply
 to restore this appeal to the paper." In the result, the wife
 presented her fresh petition and obtained a much larger sum
 for her maintenance than was provided by the separation
 deed. That decision in no way overrules, discredits, shakes

(1) 6 P. D. 98.

(2) 7 P. D. 168.

(3) 30 Ch. D. 57, 82.

(4) [1897] P. 138.

or throws the slightest doubt on the correctness of the decision in the first *Gandy v. Gandy*. (1) I am content to recall to mind (without repeating it) the emphatic language of the judgment in *Bishop v. Bishop* (2) used for the purpose (but apparently without success) of making it for ever clear that the Court of Appeal had never gone back from that decision, and that the ground of the second decision was that the refusal of the husband freed the wife from her covenant.

Let me now return to the point of distinction—namely, that in the present case the separation deed has been followed by divorce. In *Gandy v. Gandy* (1) it was only followed by judicial separation. In both cases there had been adultery by the husband.

Gandy v. Gandy (1) has established that a wife is bound by her agreement not to enforce her statutory rights under s. 190, sub-s. 4, of the Act of 1925, notwithstanding her husband's subsequent misconduct. To quote the judgment in *Bishop v. Bishop* (2): "In the first case of *Gandy v. Gandy* (1) the Court held the wife bound by her agreement, there being no circumstances to relieve her from it, and no power in the Court to disregard her covenant." If that decision was correct, how does she become relieved of her agreement in the present case, and how does the Court acquire power in the present case to disregard her covenant? The only answer suggested is the word "divorce."

Is there anything in the nature of the rights conferred by s. 190, sub-s. 1, of the Act of 1925 upon a wife different from the rights conferred upon her by sub-s. 4; and so essentially different that while a bargain to release the latter will be enforced, as in *Gandy v. Gandy* (1), a bargain to release the former should not? For myself I cannot see why this should be so. The right under each sub-section is a right conferred by statute for the personal benefit of an individual, in the latter case a wife living apart from her husband; in the former case a person whose status as wife has determined. I can see no valid reason why a contract entered into by such an individual whereby in consideration of some other benefit

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Russell L.J.

(1) 7 P. D. 168.

(2) [1897] P. 138, 162.

C. A.
1928
HYMAN
v.
HYMAN.
HUGHES
v.
HUGHES.
Russell L.J.

received, that statutory benefit is released, is not enforceable and should not be enforced. A wife can bargain away her right to consortium with her husband: *Marshall v. Marshall* (1) and *Besant v. Wood*. (2) I do not see why she should not be allowed to bargain away or modify her personal right to support from her husband whether during the continuance or after the dissolution of the marriage tie.

I put to counsel for the respondent in argument the question whether after divorce obtained by a wife, and an order made for payment to the wife of an annual sum under s. 190, sub-s. 2, of the Act of 1925, the man and woman could for valuable consideration bargain not at any time thereafter to apply to the Court under s. 196 of the Act of 1925. It was admitted that such a contract would be valid and enforceable. In my opinion the admission was correctly made, but it is quite irreconcilable with all the arguments of the respondent, except the argument of invalidity founded upon public policy.

I turn now to the argument founded on public policy. It is said that public policy requires that an agreement such as was made in the present case should be held to be illegal. Arguments which rest on so shifting and sandy a foundation as public policy require careful scrutiny—the more so when one is conscious that another element (which may equally well label itself public policy) comes into consideration on the other side—namely, freedom and observance of contract. There is no doubt a suggestion in *Bishop v. Bishop* (3) that such an agreement may be invalid. This suggestion, however, is merely obiter, and the reasons for invalidity are not formulated. If the suggestion is based upon the theory of a licence for misconduct it appears to me inconsistent with the statements in the Court of Appeal by Sir George Jessel and Cotton L.J. in *Gandy v. Gandy* (4) which I have already read; and indeed inconsistent with the actual decision in that case, in which the bargain was upheld after subsequent adultery by the husband. Moreover, upon its merits, the

(1) 5 P. D. 19.

(2) 12 Ch. D. 605.

(3) [1897] P. 138.

(4) 7 P. D. 168.

proposition does not commend itself to me—namely, that a bargain not to avail yourself of one of the bye products of a possible future divorce decree in consideration of your enjoying a fixed benefit from the date of the bargain onwards, is tainted with illegality. The fixed benefit may turn out more or less than the Court would give under the statute, but I cannot see how such a bargain can reasonably be said to be a licence to commit adultery, or to encourage a dissolution of the marriage tie. The suggestion must be that the knowledge by a husband that the wife is bound to a fixed sum, will kindle or fan the flame of passion and encourage him to embark upon a career of immorality. I decline to entertain any such far-fetched hypothesis.

The illegality point is also sought to be based upon the theory that this agreement is one executed in contemplation of divorce and therefore illegal. Speaking for myself I am not prepared to accept this general proposition. I do not see why the mere contemplation of that which the statute law of this country permits should be illegal. If the agreement goes further and can truly be said to encourage a course of conduct or action which is against public policy then no doubt the agreement would be illegal. But there is no trace of that here. There is immediate provision for the wife for all time in consideration of which she gives her covenant not at any time to ask for more. Her covenant covers the whole of the future and all contingencies; it therefore covers in fact (though not in express terms) the contingency of a divorce and the time subsequent to a divorce. To that extent only can the agreement here be said to be an agreement executed in contemplation of divorce. Is it therefore illegal? In my opinion it is no more illegal than the common form clause in a separation deed which provides that the deed shall come to an end in the event of a divorce; and no more illegal than a covenant in a separation deed (which continues in operation after a divorce) that the husband shall pay an annual sum to the wife during the rest of her life. In the former case the parties are in terms contemplating the possibility of a divorce. In the latter case

C. A.

1928

HYMAN

v.

HYMAN.

HUGHES

v.

HUGHES.

Russell L.J.

C. A. 1928
 HYMAN
 v.
 HYMAN.
 HUGHES
 v.
 HUGHES.
 Russell L.J.

the covenant covers (though not in express terms) the contingency of a divorce and the time subsequent thereto. In my opinion there is nothing illegal in the contract which we have here to consider.

When all is said and done, this fact emerges—that every argument adduced before us in support of the President's judgment is an argument which, if well founded, would have been fatal to the husband on the first appeal in *Gandy v. Gandy*. (1) We are really asked to say that that decision was wrong and that *Morrall v. Morrall* (2) was right. In the view which I take, the true legal position is the exact reverse. *Morrall v. Morrall* (2) was wrongly decided; the present appeal should be allowed and the order of the registrar restored.

In the other appeal of *Hyman v. Hyman* the same principles apply. The provision for the wife in that case consisted of substantial lump sums paid down, and a weekly sum of 20*l.*, free of tax, during her life; the covenant by the wife was that neither she nor any other person on her behalf should at any time thereafter endeavour to compel the husband to allow her any alimony or maintenance further than the said weekly sum and the lump sums. There is no substantial difference in the relevant facts of the two cases. In *Hyman v. Hyman* Hill J. simply followed the decision in the other case, as being a decision binding upon him, and given upon facts which were not capable of being distinguished. In my opinion the appeal in *Hyman v. Hyman* should also be allowed.

Appeals dismissed.

Solicitors in *Hyman v. Hyman*: *John B. & F. Purchase & Clark*; *Heywood & Ram*.

Solicitors in *Hughes v. Hughes*: *J. Westcott & Sons*; *Evelyn Jones & Co*.

(1) 7 P. D. 168.

(2) 6 P. D. 98.

SKIPWITH v. SKIPWITH.

C. A.

1928

May 18.

Divorce—Practice—Judicial Separation—Periodical Payments—Application by Husband for Suspension or Discharge—Motion or Petition—Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 196—Matrimonial Causes Rules, 1924, rr. 63, 70.

Rule 70 of the Matrimonial Causes Rules, 1924, does not apply to an application by a husband under s. 196 of the Judicature (Consolidation) Act, 1925, to suspend or discharge the periodical payments ordered to be paid to a wife who has obtained a decree for judicial separation, and such an application may therefore be made by motion.

APPEAL from a decision of Hill J.

The parties were married on January 20, 1910. Differences subsequently arose between them, and on January 22, 1925, the wife filed a petition for restitution of conjugal rights. On July 6, 1925, an order was made upon the petition, and the husband was required to comply with the order within fourteen days. He did not do so, and accordingly the wife on October 26, 1925, filed a petition for periodical payments. On November 14, 1925, the husband put in his answer. On June 21, 1926, the petition was heard, and an order by consent was made that the husband should "out of his present income, and until further order of this Court, pay or cause to be paid" the total sum of 2000*l.* per annum, to be apportioned between the wife and the children of the marriage as therein provided. On July 31, 1926, the wife presented a petition for divorce on the ground of adultery coupled with desertion, constituted by the non-compliance with the order of July 6, 1925, and on July 18, 1927, a decree nisi was made.

The limit of six months for making the decree nisi absolute expired on January 18, 1928, but no application was made by the wife to make it absolute. The husband accordingly applied by motion under s. 196 of the Judicature (Consolidation) Act, 1925, that the order for periodical payments of June 21, 1926, should be suspended or discharged. On the motion coming on to be heard objection

C. A. was taken on behalf of the wife that the application ought
1928 to have been made by petition.

SKIPWITH
v.
SKIPWITH.

The question turned on the question of the construction to be placed on r. 70 of the Matrimonial Causes Rules, 1924.

By the Judicature (Consolidation) Act, 1925, s. 196 :
“The Court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the Court thinks just.”

By the Matrimonial Causes Rules, 1924, r. 63 : “A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition supported by affidavit for an increase of the alimony allotted, by reason of the increased means of the husband or the reduction of her own means or the husband may file a petition supported by affidavit for a reduction of the alimony allotted, by reason of his reduced means or the wife’s increased means, and the course of proceeding in such cases shall be the same as required by these rules and regulations in respect of the original petition for alimony and the allotment thereof.”

By r. 70 : “The provisions of Rule 63 shall be observed in cases of application for increase or reduction of payments for maintenance and of periodical payments.”

Hill J. held that the husband’s application ought to have been by petition in accordance with r. 70.

The husband appealed. The appeal was heard on May 18, 1928.

T. J. O’Connor for the appellant. The Court has a complete discretion as to the mode of procedure with regard to periodical payments.

[LORD HANWORTH M.R. You are really applying under s. 196 of the Act of 1925.]

Rule 70 of the Rules of 1924 does not apply to an application by a husband under s. 196 to suspend or discharge an order for periodical payments, and an application for that purpose may therefore be made by motion.

C. A.

1928

 SKIPWITH
v.
SKIPWITH.

Bayford K.C. and *H. Durley Grazebrook* for the respondent. The judge was right in holding that under r. 70 the application ought to have been by petition. The practice under the provisions of the earlier Acts which correspond to s. 196 of the Act of 1925 was always to make these applications by petition. Where a regular course has been laid down and followed for a number of years it ought not to be departed from. It was quite easy for the husband to file a petition and set out in his affidavit the grounds on which he contended that the order ought to be varied. It is better that a matter of this nature should be dealt with by the registrar in chambers before the facts are stated in open Court.

[They referred to *Wickins v. Wickins* (1) and *Hooper v. Hooper*. (2)]

T. J. O'Connor was not called upon to reply.

LORD HANWORTH M.R. In this case the spouses were married on January 20, 1910, and then differences appear to have occurred between them, and proceedings were taken on January 22, 1925, by petition, the wife asking in that petition for restitution of conjugal rights. On July 6, 1925, an order was made on that petition against the husband, requiring him to comply with the order within fourteen days. That order was disobeyed, and thereupon, on October 26 of the same year, the wife presented a petition for periodical payments. That she was entitled to do, and it was one of the remedies given to enforce the restitution of conjugal rights, because by what is now s. 187, sub-s. 1, of the Judicature (Consolidation) Act, 1925, it is provided that: "A decree for restitution of conjugal rights shall not be enforced by attachment"—as I may say it used to be—"but where the application is by the wife the Court, at the time of making the decree or at any time afterwards, may, in the event of the decree not being complied with within any time in that behalf

(1) [1918] P. 265.

(2) [1919] P. 153.

C. A. limited by the Court, order the respondent to make to the
1928 petitioner such periodical payments as may be just, and the
SKIPWITH order may be enforced in the same manner as an order for
v. alimony in proceedings for judicial separation.”
SKIPWITH.
Lord Hanworth That petition was presented on October 26 for an order
M.R. for periodical payments, and on November 14 the husband
put in his answer. Finally the petition was heard, and on
June 21, 1926, the order was made for periodical payments.
The payments were to be a total sum of 2000*l.* per annum,
divided at the rate of 1200*l.* per annum for the wife, 500*l.*
per annum for a son of the marriage, and 300*l.* per annum
for maintenance and education of the daughter of the marriage.
That order was made by consent, but its terms are quite clear.
It is an order that the husband “do out of his present income,
and until further order of this Court, pay or cause to be paid”
the total sum of 2000*l.*

At first some question arose as to what was the meaning
of the word “consent” in the order. Did the fact that the
order was by consent prevent any further application in
reference to it? It appears to me quite clear from the terms
of the order that there is no such prevention. The order was
made on the basis of the then income of the husband, and by
consent, that is to say, the parties agreeing at that time that
out of the then income a sum should be paid to the wife.
But it was also a term of the agreement reached by consent
that there might be a further order of this Court. It appears
to me, therefore, that at any time when either party thought
right to come to the Court he or she could do so, though,
of course, it would be necessary for the party applying to show
some circumstances which differentiated the position at the
time of the application from the position which prevailed at
the time when the consent order was made. Subject to there
being that differentiation, it appears to me that the consent
itself involved that it was right and proper for either of the
spouses to come to the Court and ask for a further order in
relation to the matter.

That order having been made on June 21, 1926, the wife
on July 31, 1926, presented a petition for divorce. That

petition was heard in the following year, nearly a year afterwards, and on July 18, 1927, a decree nisi for the divorce of the spouses was made. During that time the liability rested upon the husband to pay to the petitioner this total sum of 2000*l*. She had obtained that right on her petition based upon the order made for restitution of conjugal rights, and it was an order made on a different petition from that on which she obtained a decree nisi.

C. A.

1928

SKIPWITH

v.

SKIPWITH.

Lord Hanworth
M.R.

The limit of six months for making the decree nisi absolute expired on January 18, 1928, but no application was made by the wife to make the decree absolute. Sometimes there is a delay in making a decree absolute. The wife is sometimes content to let the matter rest where it does, and that may in some cases work great hardship upon the husband. I know nothing of the facts of this case, and I do not, therefore, make any comment upon the delay, but in *Fox v. Fox* (1), which was before this Court, we in our judgment indicated that in an order on an application for permanent maintenance some control should be retained by the judge in the matter so as to prevent undue delay in the presentation of the petition for making the decree absolute. There may or may not be reasons why there should be some delay, but it is one of the circumstances which has to be borne in mind that there may be a delay which works hardship. Whether it has done so or not in the present case, as to which I say nothing, the husband was minded to get, if he could, a suspension or discharge of this order for periodical payments, and it is plain that once there had been a decree nisi for divorce there are certain rights which would accrue as between the spouses upon the decree being made absolute, and that it would then be unnecessary to rely upon the order made upon the petition for restitution of conjugal rights. On the other hand, if the order for the decree nisi was rescinded and those proceedings were dismissed, the position of the husband would still be that he remained liable to pay the periodical payments under the order made on June 21, 1926. On advice, therefore, he gave a notice of motion "for an order that the order for periodical payments

(1) [1925] P. 157.

C. A.
1928
—
SKIPWITH
v.
SKIPWITH.
—
Lord Hanworth
M.R.

made between the parties herein dated the 21st day of June 1926 may be suspended or discharged and for such further or other order." It is plain (whether it has any bearing upon figures or not I do not know) that from and after the date of the decree nisi the parties would be likely, shortly after, or six months afterwards, to be living apart, not on the basis of any other order but under the complete discharge of the nexus between them—namely, the marriage tie.

When that motion came before Hill J. objection was taken on behalf of the wife that this was not the way in which to apply in reference to this order made for periodical payments, and Hill J. referring to the delay in presenting the petition for making the decree absolute said : " Here the real complaint of the respondent is that the petitioner has not proceeded to make her decree nisi absolute. He has his remedy for that. He can apply to have the suit dismissed for want of prosecution "; and he then went on to say that he would not on that motion discharge the order for periodical payments because, as was contended, the husband ought to have proceeded by petition.

It is plain, as Sankey L.J. has already pointed out, that this is a highly technical point. It is this. There is a rule, r. 70, to be found in a series of rules under the heading of " Maintenance and Periodical Payments," which provides : " The provisions of rule 63 shall be observed in cases of application for increase or reduction of payments for maintenance and of periodical payments." Rule 63 is as follows : " The wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition supported by affidavit for an increase of the alimony allotted, by reason of the increased means of the husband or the reduction of her own means or the husband may file a petition supported by affidavit for a reduction of the alimony allotted, by reason of his reduced means or the wife's increased means," and so on. That rule, which indicates that a petition is the proper instrument by which to proceed, finds its place in the fasciculus of rules which deal with alimony ; r. 70 finds its place in that which deals with maintenance

and periodical payments. There is for some reason or other, and a good reason no doubt, a distinction drawn in what is called the fasciculus of rules between those which deal with alimony, rr. 57 to 64 inclusive, and those which deal with maintenance and periodical payments, rr. 65 to 70 inclusive. The technical point is this, that here is a matter in which an application is made for a further order in reference to the order for periodical payments, and the motion is in terms that the order for those payments may be suspended or discharged. It is necessary therefore to turn to the rules dealing with periodical payments to see what is the right course of procedure for the applicant to adopt, and one is confronted with r. 70, which provides that in case of application for increase or reduction of payments for maintenance and for periodical payments he is to apply r. 63; that is to say, he is to apply by petition. But it is equally plain for those who are technically minded to see that r. 70 does not apply where the application is not for increase or reduction of payments of maintenance and of periodical payments, but for their suspension or discharge.

We are told that the practice has always been in accordance with the objection taken before Hill J.—namely, that the application must be by petition. That may or may not be so, but the question that we have to decide and on which the rights of the parties turn is whether or not r. 70 has been properly construed. One must bear in mind that although s. 187 gives a power to the Court to deal, in cases upon a decree of restitution of conjugal rights, not by attachment but by making an order for periodical payments, there is also s. 196, which provides: “The Court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act,” and so on, “either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the Court thinks just.” Bearing in mind the fact that the section gives power to the Court from time to time to vary or modify any order for periodical

C. A.

1928

SKIPWITH

v.

SKIPWITH.

Lord Hanworth
M.R.

C. A. 1928 SKIPWITH v. SKIPWITH. Lord Hanworth M.R.	payments either by altering the times of payment or by increasing or diminishing the amount or by suspending the order—all those powers are given—when one comes to look at r. 70, which is ill-drawn to cover all those alternatives, it would be seen that it deals only with two of them—namely, increasing and diminishing.
---	---

It appears to me, therefore, that reliance cannot be placed on r. 70 as showing that the application of the husband in this case on March 26 was wrong, and so wrong that it ought to be rejected altogether by the Court. Sect. 196 plainly gives power to the Court to vary the order. The order by consent contemplated the possibility of there being a further order. One or other of the spouses, therefore, had the right to come to the Court, and they may come in the same way. If it is not provided by a technical rule that they must come by petition, they may come by notice of motion to the Court, and the substance of the matter is that we should get the application before the Court and before the judge. It is said that the practice has been otherwise. It may be that this is a matter for those who drew up the Matrimonial Causes Rules, 1924, and it may be that r. 70 should be altered in its terms and widened. That may be so; but as it stands at present I cannot possibly hold that it excludes the husband from coming by notice of motion, inasmuch as it only points out a specific way of dealing with two out of the five possibilities which arise under s. 196.

With regard to the inconvenience that may be caused if the matter is brought by notice of motion and not by petition, it appears to me that the learned judge, who has great experience, will be fully able to safeguard the rights of the parties, and that under the procedure of his own Court he would be able to remit the matter, if he thought right, to the registrar; in fact he will deal with it in his discretion entirely unfettered in any way.

The point that we have to decide is whether or not he was right in the wide construction which he placed upon the rule. For the reasons that I have given I do not think he was. I think the application for discharge that was made on March 26

was justified, and therefore the appeal must be allowed with costs ; and the matter will go down to be heard on its merits and in substance before Hill J., who will have a full discretion and power, unfettered by anything I have said, to deal with the matter.

C. A.

1928

SKIPWITH

v.

SKIPWITH.

SANKEY L.J. I entirely agree, and have nothing to add.

RUSSELL L.J. I agree.

Appeal allowed.

Solicitors for appellant : *Frere, Cholmeley & Co.*

Solicitors for respondent : *R. H. Behrend & Co.*

W. I. C.

Green v. Green

Overruled.

-

COLQUITT v. COLQUITT

-

[1929] P. 101

-

[1948] P. 19

||

||

GREEN v. GREEN.

1928

July 30;

Oct. 15.

Divorce—Practice—Child born before Marriage of Parents subsequently divorced—No previous Declaration of Legitimacy—Order for Care and Control of Child.

allowed.

HARRISON

v. HARRISON

[1951] P. 476

An order for the custody of a child alleged to be legitimated by the marriage of its natural parents after its birth, but not already declared to be legitimated, cannot be made on a decree nisi for the dissolution of that marriage. Nevertheless the prima facie right of a mother to have the care and control of her child born out of wedlock as recognized in decisions at common law stands on a footing different from the case of a putative father, and should be protected in divorce proceedings to which the mother is a party. Apart from the operation of, and in the absence of proceedings under the Legitimacy Act, 1926 (16 & 17 Geo. 5, c. 60), this protection can be afforded in divorce proceedings by the exercise of the general jurisdiction of the High Court in respect of infants by an order that such a child shall remain in the care and control of its mother.

The reasoning of the decision in *Bednall v. Bednall* [1927] P. 225 approved and followed.

PETITION by a wife suing as a poor person for dissolution of her marriage on the ground of the adultery of her husband. The marriage was celebrated on March 17, 1923, and there was no issue of it, but the petition asserted the legitimation of a child born on March 20, 1921. The petition included a prayer for the custody of this legitimated child.

1928
GREEN
v.
GREEN.

The case, which was undefended, was tried by Charles J. at the Winchester Spring Assizes on March 2, 1928. A decree nisi was pronounced and custody decreed to the petitioner of the child in question.

On June 11, 1928, on the return of a summons by the King's Proctor for directions arising out of a reference from the Court to the King's Proctor as to whether the order for custody should stand or be set aside, the judge in chambers (Lord Merrivale P.) adjourned the summons for argument in Court.

1928. July 30. *Sir Thomas Inskip A.-G. (Clifford Mortimer with him)* for the King's Proctor. In *Bednall v. Bednall* (1) Hill J. refused to make an order for custody in similar circumstances, on the ground that he had no power on the petition before him to arrive at the necessary findings of fact. It was contended in that case that there was power to make the order under the Legitimacy Act, Sch. I. (b). There is no doubt ground for holding that the jurisdiction in divorce does not include the power to make a declaration of legitimacy, because (inter alia) the statutory procedure under the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 188, should be followed, e.g., there are questions of the proper parties to the proceedings for legitimation, as pointed out by Hill J. We submit, however, that the decision in that case was wrong in refusing an order for custody. It does not appear from the report that the provisions of the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 193, were brought to the notice of the Court. That section re-enacted the former Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35, giving power to the Court to deal with the custody of children, the marriage of whose parents is the subject of the suit; that power is not, on the face of the statutes, confined to the case of children that are legitimate: *Jackson* otherwise *Macfarlane v. Jackson*. (2) Moreover, in the present case the child in question was by the operation of the Legitimacy Act legitimate as from the date

(1) [1927] P. 225.

(2) [1908] P. 308.

of the Act and is in the same position as any other child of a marriage.

1928

 GREEN
v.
GREEN.

[THE PRESIDENT (LORD MERRIVALE). An order for custody of a legitimated child may raise the implication of its declared legitimacy, although the proper procedure to that end has been omitted.]

J. Compton Miller for the petitioner.

Cur. adv. vult.

Oct. 15. THE PRESIDENT (LORD MERRIVALE). Difficulties have arisen in this case in respect of the drawing up of the decree in a suit for divorce where the wife, the petitioner, alleged that an illegitimate child born to her before her marriage was the offspring of the respondent and was "legitimated" by virtue of the provisions of the Legitimacy Act, 1926. At the hearing the petitioner established her charge of adultery against the respondent, and satisfied the judge that the child in question, born in 1921, was her natural child begotten by the respondent.

The learned judge, Charles J., granted the prayer of the petitioner for a decree nisi, and directed that the petitioner should have the custody of the infant.

The case was conducted under the Poor Persons Procedure and heard on circuit, and no mention was made to the learned judge of the decision of the Court last year in a case of *Bednall v. Bednall* (1), heard before Hill J., where in a considered judgment my learned brother held that an order for custody in the case of a child alleged to be legitimated by marriage of its natural parents after its birth, but not already declared to be legitimated, cannot be made except in a proceeding in which the child is represented.

The attention of the King's Proctor having been drawn to the case a summons for directions as to the form of the decree was issued. At the hearing the Court had the advantage of having the relevant facts and arguments stated by the Attorney-General. Counsel for the petitioner was also heard.

I ought to make it clear at once that no question arises of review of the findings of the learned judge at the hearing.

(1) [1927] P. 225.

1928

GREEN

r.

GREEN.

The President.

What is to be dealt with is the administrative task of framing a decree, which, taken with the record, shall both give effect to the findings of the learned judge and be good on the face of it.

The Legitimacy Act, 1926, extends legitimacy in fact to issue otherwise illegitimate. It also provides for ascertainment by legal process of status of the legitimacy so introduced. An order for custody in a divorce suit—for reasons which I will presently point out—implies a finding of legitimacy. This was recognized in *Bednall v. Bednall*. (1) A declaration of legitimacy was there sought with a consequential grant of custody. In the present case no declaration of legitimacy was prayed, but this does not help the now petitioner.

A declaration of legitimacy ascertains parentage and determines status. It establishes the relationship of parent and child with all the consequent mutual rights and liabilities, and it may introduce a new member or new members into a family or families with resultant effects of a far-reaching character, not only in respect of kinship, but of hereditary and successional rights. Sects. 3 and 6 of the Legitimacy Act are illustrative examples of this. Manifestly, then, any proceeding for declaration of legitimacy must be so constituted in respect of parties that interests obviously affected shall be represented. The first of such interests is that of the infant. Normally the person sought to be declared legitimate is personally or by guardian ad litem the actor in the cause or matter. Considerations of this kind lie behind the judgment pronounced in *Bednall v. Bednall*. (1)

Some discussion took place at the hearing before me as to whether an order for custody in this case necessarily involves a finding or declaration of legitimacy. That this is so appears upon perusal of the statute which empowers the Court to grant custody—originally the Matrimonial Causes Act, 1857, s. 35, and now the Judicature Act, 1925, s. 193. “Children” in these enactments means legitimate children in the sense that at the time of the suit they are legitimate. Ascertainment of their legitimacy is as necessary when the Legitimacy Declaration Act, 1926, is invoked, as it would

(1) [1927] P. 225.

be if parties of foreign origin, who under their native law had legitimatised ante-nuptial offspring, should afterwards become naturalised or domiciled here, and be parties in a matrimonial suit.

1928

 GREEN
v.
GREEN.

 The President.

Perusal of the record and application of the reasoning of *Bednall v. Bednall* (1) shows that an order for custody could not be made in the suit as at present constituted. Consequently, as the suit stands, no decree embodying such an order can properly be drawn up or issued. I am glad to say, however, that this difficulty as to an order for custody under the statutory powers of the Court in that behalf does not necessarily dispose of the petitioner's claim to have the care and control of her child.

Apart from the Legitimacy Act, 1925, the claim of the natural mother of a child born out of wedlock to have the care and control of the child stands on a different footing from that of a putative father. Guardianship at common law she could not have, but by reason first of the acceptance under the Judicature Act of the equitable view of her claim, and by virtue also of modern statutory enlargements of the powers of the Courts in respect of infants, she is now in a position defined by Lord Herschell in *Barnardo v. McHugh* (2): "The desire of the mother of an illegitimate child as to its custody is primarily to be considered," though the Court would not exercise its jurisdiction in her favour to the detriment of the child. *Reg. v. Lewis* (3) and *Rex v. New* (4) are cases illustrative of the mode in which before the Legitimacy Act, 1926, the Courts recognised this rule. As was said by Lord Coleridge in *Reg. v. Lewis* (3): "Prima facie, and in the absence of any strong reasons to the contrary, the mother—the natural mother—of children not in law legitimate has the right to their custody."

Apart from the Legitimacy Act there are, therefore, strong reasons for allowing the claim of the wife in this case to have the care and control of the child in question.

Bednall v. Bednall (1) was a different case from this in that, there the petitioner, the husband, was alleging himself

(1) [1927] P. 225.

(3) (1893) 9 Times L. R. 226, 227.

(2) [1891] A. C. 388, 399.

(4) (1904) 20 Times L. R. 515.

1928
GREEN
v.
GREEN.
The President.

to be the natural father of a child born out of wedlock to the respondent afterwards his wife, and seeking to deprive her of rights to which prima facie she was before marriage entitled. Of her natural relationship there could be no question. As to his the considerations arise which underlie the old saying as to a bastard: "filius nullius est." The prima facie right of the wife to the care and custody of her child must be protected, and I propose to do this by a direction made in the exercise of the general jurisdiction of the High Court in respect of infants, that until further order the child named in the petition is to remain in the care and control of the petitioner. For the child's maintenance the Poor Law Acts rendered the respondent liable upon his marriage to the petitioner. If it becomes necessary or is thought worth while to enlarge this liability a way can no doubt be found under the Poor Persons Procedure or otherwise to secure for her the declaration of legitimacy, which will enable her to make a further application in this cause in this behalf. The present cause will be still pending till the decree is made absolute, and the inadvertent omission which has given rise to the difficulty I have had to deal with can no doubt be repaired without great delay or considerable expense.

Solicitor: *The King's Proctor.*

Solicitors for the petitioner: *Pearce & Keele, Southampton.*

R. M. M.

In the Estate of JAMES AND MARION CHRISTIE
BORDASS.

1927
Dec. 19.

1928
Oct. 29.

Administration—Settled Land—Land settled previously to Death of Tenant for Life—Determination of Settlement on Death of Tenant for Life Intestate—General Grant of Administration to Estate of Tenant for Life made to Remainderman under Settlement—Citations.

Land was devised to M. C. B. for life with remainder to W. B. absolutely. M. C. B. died intestate, and the settlement came to an end. A general grant of administration to the estate of M. C. B., including the settled land, was made to W. B. on the citation of all persons interested in the estate of M. C. B. and non-appearance by them.

Principle of the decision in *Bridgett & Hayes' Contract* [1928] Ch. 163 followed.

JAMES BORDASS, deceased, by his will (proved October 28, 1897) devised all his real estate to the use of his wife Marion Christie Bordass during her life and after her death to William Bordass absolutely. There were no trustees of the settled land for the purposes of the Settled Land Acts. Marion Christie Bordass died on May 9, 1927, intestate, a widow, without known parent or issue brother or sister or their issue, grandparent, uncle or aunt or their issue. The legal personal representatives of James Bordass, who were the executors of his surviving executor, had renounced administration of the estate of Marion Christie Bordass. The real estate devised by the will of James Bordass consisted of a freehold dwelling-house and shop in Middle Street, Great Driffield, and a small piece of freehold land at Great Driffield in the county of York. On August 13, 1906, William Bordass and William Edward Baker, who was sometime since deceased, were appointed new trustees of the will of James Bordass with a vesting declaration.

1927. Dec. 19. The Court made an order on motion for a grant of administration to the estate of Marion Christie Bordass limited to the trust estate in the settled land. The registrar refused to proceed with this order unless and until

1927
JAMES AND
MARION
CHRISTIE
BORDASS,
In the Estate
of.

the consent was obtained of the Treasury Solicitor following the decision in *Bridgett & Hayes' Contract* (1), the effect of which was that the settlement having come to an end with the death of the tenant for life the legal estate and the power to give a title vested in the person to whom a general grant should be made of the estate of the tenant for life.

The Solicitor for the Treasury having required the citation of all persons interested in the estate of the tenant for life a citation duly issued against all such persons to accept or refuse general administration to the estate of Marion Christie Bordass or show cause why the same should not be granted to the applicant William Bordass. No appearance was entered to the citation.

The applicant now moved on affidavits of the facts for a general grant of the estate of Marion Christie Bordass on the grounds that the legal estate in fee simple in the settled land became on January 1, 1926, vested in the tenant for life as trustee, and that simultaneously the interest in remainder of the applicant became an equitable interest.

Noel Middleton for the applicant. I rely on *In re Bridgett & Hayes' Contract*. (1)

The Court (Hill J.) made a grant as prayed. Costs of the applicant of both motions as between solicitor and client to be paid out of the estate.

Solicitors: *Seeley & Son, for Sutcliffe & Sutcliffe, Bridlington.*

(1) [1928] Ch. 163.

R. M. M.

THE YOUNG SID.

1928

Oct. 16, 17 ;

Nov. 22.

Shipping—Collision—Practice—Both Vessels to blame—Appeal—Variation of Proportions of Blame—Costs.

On appeal from a judgment in a collision action in which the county court judge had found both vessels to blame in the proportions of two-thirds and one-third, the appellants succeeded in reversing the judgment to the extent that both vessels were held to blame in equal degrees :—

Held, that the practice generally followed where, although there was a finding of both to blame, one of the parties had succeeded on appeal, was that the costs of the appeal followed the event of the appeal : see *The Ceto* (1889) 14 App. Cas. 670, 697 ; *The Fyenoord* (1858) Swa. 374 ; and that the observations of Lord Phillimore in *The Canton* (1928) 31 Ll. L. Rep. 289, 293 should not be taken as throwing doubt on the general practice.

APPEAL in an action of damage by collision from a decision of the county court judge sitting at Lowestoft.

The appellants (plaintiffs) were the owners of the steam drifter *Ocean Swell* ; the respondents (defendants) were the owners of the steam drifter *Young Sid*. The collision took place in Lowestoft Harbour on November 10, 1927. The county court judge, who was assisted by nautical assessors, held both vessels to blame, the owners of *The Ocean Swell* to bear two-thirds of the damages, and the owners of *The Young Sid* one-third, each party to pay their own costs. The plaintiffs appealed.

By their notice of appeal the plaintiffs alleged that *The Young Sid* was alone to blame, and on the hearing of the appeal they raised this contention, and argued alternatively that if not solely to blame the preponderance of blame rested with *The Young Sid*.

The Divisional Court allowed the appeal, holding that both vessels were to blame, but in equal degrees.

The President (Lord Merrivale) said that he could not find with certainty that either of the skippers was more to blame than the other. Looking at the evidence as a whole, it seemed that *The Ocean Swell* was in the fairway at a time when those on *The Young Sid*, if they had been paying attention, could have avoided the collision without difficulty ; but he could

1928 not, in the absence of a finding by the learned judge, support
 THE YOUNG that view.
 SID.

Hill J. agreed. He said that in his opinion the learned judge was clearly right in holding both vessels to blame, but equally clearly wrong in finding the greater blame on *The Ocean Swell*. His Lordship's own doubt was whether the apportionment ought not to have been reversed, and *The Young Sid* held two-thirds to blame; but, on the whole, when the Court arrived at the conclusion that both vessels were to blame, there were not sufficient grounds for apportioning the wrong, and he agreed therefore that the appeal should be allowed and the judgment varied to a finding of both equally to blame.

The question of costs was then argued.

Langton K.C. and *Naisby* for the appellants. Unless there are special circumstances the usual practice is that where, as in this case, the appellants in substance have succeeded they are allowed the costs of the appeal. In *The Peter Benoit* (1), where both vessels were held to blame and the question of costs was argued at some length, Pickford L.J. said: "If a man substantially succeeds on appeal he gets his costs." See also *The Clara Camus* (2), where the Court of Appeal gave effect to the practice.

[HILL J. referred to *The Modica*. (3)]

H. L. Holman for the respondents. The trend of the authorities is that costs are not given in both to blame cases: see *The Orduna* (4) and *The Karamea* (5), in both of which, although the appellants succeeded in obtaining a decision of both to blame, the Court of Appeal did not allow costs. That practice received the approval of Lord Phillimore in *The Canton* (6), a House of Lords' decision, which must be

(1) (1913) Fo. 429. The case is printed in the House of Lords reported 84 L. J. (P.) 87, but not on record.—REPORTER.
 the question of costs; the obser- (2) (1925) 23 Ll. L. Rep. 181.
 vation of Pickford L.J. is taken (3) [1926] P. 72.
 from the shorthand notes of the (4) [1919] P. 381.
 argument in the Court of Appeal (5) [1921] P. 76.
 (6) 31 Ll. L. Rep. 289.

taken as overruling the cases in which costs have been allowed to an appellant only partially successful. In the present case the difference in the amount for which the appellants will be liable by the reduction from two-thirds to one-half is trifling.

Langton K.C. in reply. In *The Karamea* (1) the appellants only succeeded "on a minute point." In *The Canton* (2) Lord Phillimore was dealing with the costs on the facts of that case; his observations do not affect the general practice, and costs must always be in the discretion of the Court.

Cur. adv. vult.

1928. NOV. 22. THE PRESIDENT (LORD MERRIVALE). A question arose in this case with regard to the costs. It was an appeal from the county court in a collision case, where, in the Court below, both vessels had been found to blame, but the appellants' vessel, *The Ocean Swell*, two-thirds, and the respondents' vessel, *The Young Sid*, one-third, to blame. We found, upon the hearing of the appeal, that in respect of the matters as to which the appellants had been held to blame there were errors in the judgment, and that there was not the preponderance of grounds of complaint against the appellants which had been found in the county court. I confess my own mind inclined rather to the view that the preponderance of blame was more on the part of the respondents than on the part of the appellants, but on considering the matter we came to the conclusion that as the matter stood—taking due account of the findings of the learned judge upon the grounds of alleged default, as to which there was evidence—we ought to hold the vessels equally to blame. Then arose the question of costs; and I do not think that there would have been any difficulty in dealing with it in the ordinary course had it not been that attention was directed to some observations in a recent judgment in the House of Lords in *The Canton*. (3) There Lord Phillimore, who delivered the leading opinion, considered

(1) [1921] P. 76.

(2) 31 Ll. L. Rep. 289.

(3) 31 Ll. L. Rep. 293.

1928
THE YOUNG
SID.
The President.

the question of costs in a case where *The Rhesus* had been found alone to blame in this Court, and on appeal that decision was reversed and *The Canton* found alone to blame. In the House of Lords the vessels were held both to blame in equal proportions. Then came the question of costs, and with regard to the facts in that case, Lord Phillimore, having stated that the ancient rule was that where both vessels were to blame each party should bear his costs in the Court of first instance, dealt with cases where distinctions had been made upon the facts and the costs had been distributed between the parties, and used these words : " I see that in the case of *The Orduna* (1) the Court of Appeal, holding, as your Lordships did afterwards, that both vessels were to blame, held that there should be no costs ; and I would recommend your Lordships not to interfere with this settled rule of practice and to hold that there should be no costs either in the Admiralty Division or in the Court of Appeal, and I think that this should also be the rule in your Lordships' House when the appellant seeks for a total reversal and the result in your Lordships' opinion is that both vessels are to blame." In my opinion, when the matter is closely considered, the observations there made do not interfere with what I think is the practice generally followed in this Division, at any rate, and I believe accepted as being followed in the Court of Appeal, that where one of the parties, although there is a finding of both to blame, has succeeded upon appeal, then, in respect of the appeal, the costs of the appeal, ordinarily, will follow the event of the appeal.

Happily the matter does not rest upon mere convenience or practice of this Court, because I find that there are two well known cases where the House of Lords and the Privy Council came to conclusions which warrant the course which has usually been taken here. In *The Ceto* (2) Sir James Hannen had found the appellants' vessel, *The Lebanon*, alone to blame. In the Court of Appeal that judgment had been affirmed, but in the House of Lords both vessels were held to blame. Although both vessels were held equally to blame as matters

(1) [1919] P. 381.

(2) 14 App. Cas. 670, 697.

then stood—it was before the passage of the Maritime Conventions Act—the respondents were ordered to pay the appellants' costs in the Court of Appeal and in the House of Lords. There is also the older case of *The Fyenoord* (1), where the Privy Council, which in those days was the Court of Appeal in Admiralty jurisdiction, exercised its powers in a similar way. The appellant there had been found in the Court of first instance solely to blame ; on appeal both vessels were held to blame, and the damages were equally divided, but the appellant got the costs of the appeal.

1928
THE YOUNG
SID.
The President.

I have mentioned these authorities because it is undesirable that a practice which is recognized in this Division should be supposed to be in doubt, owing to observations in a case which does not raise the immediate issue which is in question here. Cases of equal authority with *The Canton* (2) show clearly that the matter of costs is in the control of the Court, and that being the case, although it be true, as Mr. Holman pointed out, that only a comparatively small amount is involved, the appellants had substantial ground of appeal, and they have succeeded, and it seems to me that so far as the appeal is concerned they ought to have their costs of the appeal.

HILL J. I agree.

Solicitors for the appellants : *Botterell & Roche, for Chamberlin, Talbot & Bracy, Great Yarmouth.*

Solicitors for the respondents : *Holman, Fenwick & Willan, for Wiltshire, Sons & Jordan, Lowestoft.*

(1) Swa. 374.

(2) 31 Ll. L. Rep. 289.

1928

Dec. 3.

WILLIAMS v. WILLIAMS (WARD INTERVENING).

Divorce—Practice—Costs of Wife—Principle of Provision of Costs—Discretion of Registrar—“Sufficient separate estate”—Capital and Income of Husband and Wife—Allowance under Deed of Separation—Matrimonial Causes Rules, 1924, r. 91.

The principle that the Court will provide for the wife's costs of a matrimonial suit originally arose from the fact that on her marriage her property passed to her husband, but it still obtains, though at the present day the question is whether as a litigant she has sufficient separate estate wherewith to pay the costs of a solicitor. The power of a registrar under r. 91 to provide for the wife's costs is discretionary and not subject to review unless he has clearly proceeded on a basis which is wrong. He is entitled to take into consideration the capital and income of both parties and the nature and availability of it in arriving at a conclusion as to the “sufficient separate estate” of the wife within the rule. Among other matters the amount of an allowance under an existing deed of separation is a factor, although partly and primarily intended as an alimentary provision and not as a fund for defraying costs.

ADJOURNED SUMMONS.

Wife's petition for dissolution of marriage.

On January 8, 1927, the spouses executed a deed of separation. The husband covenanted to pay to the wife *dum casta* and during joint lives the clear weekly sum of 7*l.* 9*s.* for her maintenance and that of two girls, children of the marriage, of whom it was agreed that she should have the custody. The husband was to have the custody of another child of the marriage, a boy, and to pay the wife, besides the allowance, all reasonable costs of medical attendance for herself and the two girls, and the school fees of the latter. Both parties had capital, as distinguished from income.

On February 1, 1928, the wife filed a petition for dissolution of the marriage, alleging the adultery of the husband. There was no application by her for alimony pendente lite, but having set the cause down she applied for security for the costs of the hearing. On October 22, 1928, the registrar refused to order security on the ground of the relative means of the parties. No appeal was entered against this decision of the registrar, and an existing stay of the proceedings was removed on October 24, 1928, on the application of the wife.

On October 25, 26, 30 and 31, 1928, the trial took place before Hill J. and a special jury who disagreed.

1928

WILLIAMS.

v.

WILLIAMS.

At the trial, and before the case was opened, counsel for the wife applied that any appeal from the registrar should not be prejudiced by the fact of the hearing having proceeded, and by consent Hill J. directed that no objection should be taken merely on that ground, but that the husband should be at liberty to contest the necessity for security.

The trial then proceeded, with the result stated.

On October 31, 1928, the wife issued the present judge's summons calling on the husband to show cause why the registrar's order refusing security should not be varied, and why the time for appealing should not be extended. The summons was adjourned into Court for argument.

Dec. 3. *H. Clifford Mortimer* for the wife. The registrar has proceeded upon a wrong basis. The question before him was the amount of the separate income of the wife: *Allen v. Allen*. (1) Her interest under the deed was wrongly taken into account. That provision was for her support, and not to enable her to pay her own costs. The registrar has also wrongly taken into consideration capital of the wife.

He also referred to *Robertson v. Robertson* (2) and *Westmeath v. Westmeath*. (3)

R. F. Bayford K.C. (*G. C. Tyndale* with him) for the husband. The appeal is out of time. In *Clark v. Clark* (4) a wife's allowance under a deed of separation was treated as a fund for the purpose of actually condemning her in her husband's costs. Divorce Rule 91, under which the registrar proceeded, is perfectly general, and the "separate estate" of the wife there referred to is not limited to her income. The wife's solicitor took off the stay, and it is now too late after the trial to apply for security.

HILL J. This is an appeal from an order by the registrar refusing to make an order in respect of the wife's costs before

(1) [1894] P. 134.

(2) (1881) 6 P. D. 119.

(3) (1828) 2 Hagg. Ecc. Supp. 1,

p. 133 (at foot).

(4) [1906] P. 331.

1928
WILLIAMS.
v.
WILLIAMS.
HILL J.

trial, refusing to tax a bill of costs up to setting down, or to order security for further costs. He refused it on October 22, 1928, and the case actually came into the list on October 25, and was tried on that and subsequent days. The wife did not appeal against the registrar's order until the time for appealing had run out. It had not run out when the trial began. It ran out while the trial was going on. There were a couple of days during which the notice of appeal might have been served; it was not served till some six days later—out of time. However, I am not going to decide this case upon that point. I think it will be more satisfactory to the parties if I do not deal with the matter by simply refusing to extend the time for appeal. I extend the time for appeal.

Now is there any ground upon which I can set aside the order of the registrar? Divorce Rule 91 directs that the registrar shall deal with the costs and ascertain what is a sufficient sum of money to be paid into Court or sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing, and may thereupon, unless the husband shall prove to the satisfaction of the registrar that the wife has sufficient separate estate or show other good cause, issue an order upon the husband to give security. To my mind that is a matter for the registrar's discretion, and by old established principles, the judge does not interfere with matters which are in the discretion of the registrar, unless it is pretty clear that the registrar has proceeded upon some wrong principle or has completely overlooked matters which he ought to have taken into account. In my view it is absolutely in the discretion of the registrar to exercise his mind upon the materials mentioned in the rule, that is, the question of the wife having separate estate or there being other good grounds for not making the order. Now the words "separate estate" are absolutely general; they are not limited to the income of the wife or to the capital of the wife; they are her "separate estate." No doubt the rule repeats words which were first used at a time when the wife generally had no separate estate. At any rate the effect of the Married Women's Property Acts is that the power of

a married woman to hold separate estate has been enormously increased, that is to say the existence of the subject-matter which the registrar may have to consider, namely, a wife's separate estate, is of much greater importance than it used to be, and the registrar has now to consider a great deal more than before when considering the whole of the wife's separate estate. Is there anything to limit that view? Mr. Mortimer says that *Allen v. Allen* (1) in the Court of Appeal limits it. I do not so understand *Allen v. Allen*. (1) *Allen v. Allen* said in substance: "This case has been decided by the judge (under the then existing rule the discretion was the judge's) and we do not interfere; it is said that you ought not to look at the income: if the judge has looked at the income, as he thinks it is right to look at the income, we cannot say that he is wrong to look at it." Therefore, the registrar, in my view, under the rule had a right to consider the income of the husband, the income of the wife, the capital of the husband and the capital of the wife. Now has he considered it on any wrong basis? Counsel for the wife says that he has, but I cannot read that into the decision; I cannot find how that is necessarily involved in the decision. The wife, under a separation deed, was receiving for herself and her three children weekly payments working out at 387*l.* a year. The husband had the third child and had undertaken to pay the schooling and the doctor's bills of the two children with the wife, and his total income on the three years' average was about 700*l.* or 800*l.* a year. It may well be that you ought not to take into account the whole of the amount secured by a separation deed and treat it as absolutely free income of the wife, because part of it, at any rate, is to be treated as paid for the support of herself and children, just as would be the case if an order for alimony pendente lite were made, and I quite follow the argument of counsel for the wife that if you give alimony pendente lite with one hand, you must not take it away with the other. But it seems highly probable that, having regard to the income of the

1928

 WILLIAMS
 v.
 WILLIAMS.
 HILL J.

(1) [1894] P. 134.

1928
WILLIAMS
v.
WILLIAMS.
HILL J.

husband and the liabilities of the husband and the position of the wife and her liabilities with regard to the two children, nothing like 387*l.* would have been awarded as alimony pendente lite, and I think that the sort of figure suggested on behalf of the husband, something like 220*l.*, would probably have been nearer the mark. So it seems to me quite legitimate for the registrar to take into account that the wife under the separation deed was getting more income than she would have got under an order for alimony pendente lite, and it was for him to consider how much more. Then, on the other hand, it seems to be pretty clear as to capital that the wife had realizable capital and that the husband had capital rather in excess in the aggregate of the wife's capital, but not realizable, or most of it not realizable. The wife, at any rate, had got 100*l.* in War Loan and some Midland Bank shares which there would have been no difficulty in raising money upon. All these matters are to my mind for the consideration of the registrar, and he was entitled to consider them as a whole ; what income is the wife receiving, what would be given her for alimony pendente lite, what capital has the wife, what income is the husband receiving, what capital has the husband, is the wife's capital easily available, is the husband's capital easily available ? They are all matters to be taken into account, because, on the one hand, you have to consider whether the wife has sufficient separate estate and, on the other hand, you have to consider the husband's ability to pay. Those matters are all for the registrar's discretion. It is quite impossible for me to say he has exercised his discretion in a wrong way by saying : " Looking at it on the whole I see no reason for giving the wife any security." The main object of security, in recent years at any rate, is that justice may be done by the wife being enabled to procure the assistance of solicitor and counsel and come to Court. That is the main object in modern times. The old basis for the rule, namely, that all the wife's property on marriage passes to the husband, and therefore the husband alone can foot the bill, has gone altogether, and now you must consider whether in the circumstances

the wife can foot the bill, and it is a very important matter to consider whether the solicitor can conduct the business without something in Court to pay him up to setting down and without security. Here it is quite obvious that the solicitor could, and was willing to, conduct the business up to a point, without security, and indeed he only applied for security a very short time before the case came on for trial, but he did apply and it was refused. It was in his power then to appeal or to say to the wife: "I am very sorry I cannot go on: I am out of funds and the matter must stand over until something is done, until I have got some order against the husband." But in fact he did neither of these things. There was a stay until the question had been settled, and on October 24 the stay was removed, the case coming into the paper the following morning. When the trial started counsel for the wife made his application that the question of security should be kept alive. It is quite clear that briefs had then been delivered and witnesses brought up from the neighbourhood of Birmingham; therefore it cannot be said in this case that it was essential to the administration of justice that the wife's solicitor should be put in funds.

The matter was in the discretion of the registrar, and he has not done anything wrong. He has taken into account, as far as I can see, the things he was entitled to take into account, and he has arrived at a decision, and I cannot upset it. The summons will be dismissed.

Summons dismissed with costs, limited to the wife's separate estate.

Solicitors for the wife: *Foster Grave & Jay.*

Solicitors for the husband: *Robbins, Olivey & Lake.*

R. M. M.

1928

WILLIAMS
v.
WILLIAMS.
Hill J.

C. A.

1928

Nov. 8, 9.

SHERWOOD v. SHERWOOD.

Divorce—Permanent Maintenance of Wife—Proportion of Husband's Income—Deduction of Taxes—Current Year—Discretion of Court—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190, sub-ss. 1, 2.

In estimating the disposable income of a divorced husband after meeting his liability for taxes for the purpose of allotting permanent maintenance to his wife in futuro within the principle of *Dayrell-Steyning v. Dayrell-Steyning* [1922] P. 280, the amount of deduction from his gross income in respect of income tax and super tax is the amount of those taxes chargeable on income received during the current year.

There is no fixed rule that the Court will allow to the wife one-third of the husband's disposable income as permanent maintenance. It is no more than a rough working rule and does not impose an absolute limit. Further, in estimating the amount of the allowance the Court must not focus its attention only on the disposable income of the husband in the year preceding the making of the order, but must have regard to his earnings in previous years and to his probable earnings in the future.

In making an order for permanent maintenance the Court is given a wide discretion by s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, with which the Court of Appeal will not readily interfere unless it is satisfied that the Court below has proceeded on some wrong principle.

Dayrell-Steyning v. Dayrell-Steyning [1922] P. 280 discussed and explained.

Decision of Lord Merrivale P. [1928] P. 215 affirmed.

APPEAL from a decision of Lord Merrivale P. (1)

The wife, petitioner in a suit for dissolution of marriage, having obtained a decree nisi on July 26, 1927, filed her petition for permanent maintenance on December 14, 1927, alleging the income of the respondent husband to be 15,000*l.* per annum.

The husband by his answer set up a net income from earnings of 6153*l.* 10*s.* in 1925, 3959*l.* 2*s.* 1*d.* in 1926, and 1258*l.* 6*s.* 2*d.* in 1927. These figures were net. He also admitted an income from investments of 1090*l.* The wife, in reply, alleged that in 1923 the income of the husband

from earnings was 20,000*l.*, in 1924 19,000*l.*, and in 1925 nearly 14,000*l.*, after which, as was admitted, the income of the husband was affected by his health, which interfered with his earning capacity. The husband was an unqualified practitioner in a branch of surgery. There were two children of the marriage in the custody of the wife, both boys, born in 1915 and 1916 respectively. Alimony pendente lite was at the rate of 2000*l.* per annum. The decree was made absolute in February, 1928. The registrar to whom the petition for permanent maintenance was referred reported that the gross income of the husband for 1927 was 7500*l.* per annum, and that his net income after paying income tax and super tax and 400*l.* on a policy, and the expenses of earning the income in question, was 1900*l.* in the same period, and that the wife had a separate income of 107*l.* The registrar on May 25, 1928, made an order for the payment of 200*l.* per annum during the joint lives of the parties, and for a further sum of 400*l.* per annum to be secured to the wife for her life. He further ordered annual payments of 150*l.* for each child, and in a report, giving his reasons, at the request of the parties, stated that, following *Dayrell-Steyning v. Dayrell-Steyning* (1), he had allotted one-third. approximately of the disposable income of the husband remaining in his hands after paying the expenses of earning it. The wife took out a summons, returnable before the judge in chambers, to vary the order of the registrar. On June 26, 1928, the summons was heard in chambers by Lord Merrivale P., who on July 2 delivered a considered judgment in Court in which he held that in considering the disposable income in futuro it was not material that in the year of calculation the husband, by reason of great earnings in previous years, was liable to taxes which left him a small margin only; that, taking the husband's income at 7500*l.*, the taxes normally falling due at this rate would not amount to 2000*l.* per annum; and that, applying the ordinary principles of the Court, the proper sum to allot, taking into account the income of the wife, would be 1600*l.* per annum.

C. A.
1928
SHERWOOD
v.
SHERWOOD.

(1) [1922] P. 280.

C. A. The husband appealed. The appeal was heard on
1928 November 8 and 9, 1928.

SHERWOOD *Cotes-Preedy K.C. and Bush James* for the appellant. In
v. order to compute the maintenance to be paid there should
SHERWOOD. be deducted from the husband's income the expenses of earning
it and income tax and super tax, and the wife should receive
one-third of the net income tax free: *Dayrell-Steynning v.*
Dayrell-Steynning. (1) The President ought not to have
departed from the rule there laid down, even though, owing to
a fall in the husband's earnings, there is a large sum payable
for taxes out of the year's income on which maintenance
is being computed.

[LORD HANWORTH M.R. Under the Judicature (Consolidation) Act, 1925, s. 190, the Court has to award such sum for maintenance as having regard to the considerations there specified it "may deem to be reasonable."]

Yes, but in order to decide that some prior method of computation must be adopted, and it is contended that that laid down in *Dayrell-Steynning v. Dayrell-Steynning* (1) is proper to be applied. Calculation is made by reference to the husband's income of the particular year, as forming the basis of what will be his future income.

In his judgment the President says that it was agreed between the parties that the husband had recovered from the ill health which had caused the fall in his earnings. This is not correct; the husband is still suffering from a weak heart. On no possible calculation ought the husband to be called upon to pay 1600*l.* as permanent maintenance to his wife. The order of the registrar ought to be restored.

Noel Middleton for the respondent submitted that upon the figures the amount of the maintenance arrived at by the President was correct.

[He was stopped.]

LORD HANWORTH M.R. This case comes before us on appeal from an order for permanent maintenance by the learned President of the Divorce and Admiralty Division.

The reason why the appeal is taken before us is to raise the question whether or not the learned President has measured the sum to be paid for permanent maintenance on a right basis. In the present case the wife was the petitioner, and she obtained a decree nisi for divorce on July 26, 1927. That decree was made absolute in this year, but on December 14 the wife petitioned for permanent maintenance. The matter went before the registrar for him to ascertain the figures and to report, and came before the learned President by way of appeal from an order of the registrar. The registrar in his report made at the request of the parties, in giving his reasons for his order, said: "I allotted maintenance at the rate of one-third of the disposable amount of income which remained in the husband's hands after paying the expenses of earning it and ordered 400*l.* of this sum of 600*l.* to be secured for the wife's life." We need not deal with the question of the children, who under either of the orders made are provided for at a fixed amount. The registrar's order was that permanent maintenance should be fixed at 600*l.* a year, and of that 400*l.* a year should be secured. The learned President has varied those figures, or rather the former figure, by directing that the total amount to be paid for permanent maintenance is to be 1600*l.* a year, but leaving the sum to be secured at the same figure at which the registrar left it—namely, 400*l.* a year. The question is whether or not he has dealt with that application for maintenance rightly.

By s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided that: "The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable." Now that relates to the sum which is to be secured to the wife, that is to say, in this particular case 400*l.* a year. By sub-s. 2 of the same section it is provided: "In any such case as aforesaid the Court may, if

C. A.

1928

SHERWOOD

v.

SHERWOOD.

Lord Hanworth
M.R.

C. A.
1928
SHERWOOD
v.
SHERWOOD.
Lord Hanworth
M.R.

it thinks fit, by order, either in addition to or instead of an order under sub-section (1.) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable."

It is quite clear that under sub-s. 2 a very wide discretion is given to the Court that makes the order; it is such sum as the Court may think reasonable. It is obvious that the Court of Appeal, bearing in mind that wide discretion given to a Court of first instance, would be reluctant to interfere with any individual exercise of that discretion unless it was satisfied that some principle not approved of by the Court had been followed. It has already been decided in *Dayrell-Steyning v. Dayrell-Steyning* (1) that the husband's income must be regarded as the disposable amount which remains in his hands after paying the expenses of earning it. Those expenses include his liabilities for income tax, super tax, and, where chargeable, excess profits duty. Therefore all these must be deducted to arrive at the income, one-third of which is to be allowed for the wife's maintenance. The judgment sets out very clearly those propositions which are collected in the headnote. The only observation that I desire to make about that case and about that headnote is this, that I think it would be a mistake to lay down that any rule has been reached as an absolute rule of law in all cases, which could not be varied if the circumstances demanded it. It is quite clear from the information we have as to the practice of the Divorce Court that the rule to allow a sum of one-third of the husband's disposable income, is a rule which is usually and most often adopted. But if it were to be determined that that sum must be one-third calculated out to shillings and pence, I should disagree with that interpretation of the rule. One-third may be a good working rule, but I can understand that in particular cases and under particular circumstances it might not be possible to adhere to that rule rigidly, and therefore, while it is to be taken as a guide, it is not to be taken as an absolute limitation.

(1) [1922] P. 280.

In the present case the real dispute that arises is in consequence of the figures, which have shown up to a point decreasing income earned by the husband. The husband carried on a professional business which was very profitable, and in the year 1925 the actual fees received by him for his business conducted in London, Liverpool and Manchester were no less than 22,180*l.* Naturally there were heavy expenses incurred to earn those fees, and the total expenses to be deducted from that sum were 9886*l.*, leaving, therefore, net profits which were assessable to taxes at 12,294*l.* The income tax on that year and the super tax together amounted to a sum of 6140*l.* There was thus in the hands of the husband a disposable income of 6154*l.* That was for the year 1925. Since that time the husband has unfortunately suffered from ill health, with the result that his actual income and his disposable surplus have been very much reduced, and in the year 1927, after all taxes had been paid, the amount that was left as his disposable income was 1258*l.* That, however, was calculated in a particular way, because the husband took into his business a partner, and that partner is entitled to an aliquot proportion of the profits which are found in the figures that have been placed before us.

It is said, therefore, by Mr. Cotes-Preedy and Mr. Bush James that if regard is paid to the circumstances of the year 1927, the last year of which we have any concluded figures, it is plain that the disposable income, which was as considerable as 6154*l.* in 1925, is now represented by a figure of 1258*l.* and no more. It is further argued that regard should be paid to this last figure, that attention should be centred upon the last year of truly available figures, and therefore that an estimate based upon an appreciation of the disposable surplus in the hands of the husband in future years is not warranted by any actual facts and ought not to be regarded in estimating the sum which is to be paid by the husband in future years. The inconvenience of that is summarized in this way by Mr. Cotes-Preedy, that although it is true that an application can be made from time to time under the powers which are reserved in the proviso to sub-s. 2, yet the husband will have

C. A.

1928

SHERWOOD

v.

SHERWOOD.

Lord Hanworth
M.R.

C. A.
1928
SHERWOOD
v.
SHERWOOD.
—
Lord Hanworth
M.R.

an order definitely made upon him with regard to the year during which it is enforced, with which he will have to comply and with which, it may be, he will be unable to comply unless the promise and hope of the future are in fact attained.

The learned registrar seems to have acceded to that view ; he appears to have determined his total of 600*l.* by having regard to the last year, 1927, and treating the income of the husband as one which has decreased and is in its nature decreasing. That alone could justify the small figure which has been ordered by him to be paid. In my opinion the learned President is right in the way in which he has dealt with the figures before him. It is true that looked at over a sequence of years it may be justly contended by the husband that his disposable income has in fact been reduced each year during the last few years ; but it appears to me that the learned President was quite right in saying that what he had to do was to consider what sum ought to be assigned, what might be assigned, if the Court thought fit, in addition to the secured sum, for the purpose of the support of the wife during the joint lives, and that a wide discretion was given to him inasmuch as that sum was to be such as the Court might think reasonable.

Is it reasonable to fix attention only on the past ? If you are regarding the joint future lives of the husband and wife, is it not right to take into account not merely those features which would be regarded by a pessimist, but also those features which would be regarded by an optimist ? Is it right to say that this income will decrease or will remain stationary at the low figure which it has reached ? As I understand the matter, although there was not definite evidence upon the point, it was conceded that the husband will be able once more to undertake his professional duties, and, with the assistance of the partner, he will still be able to maintain the business carried on in London, Liverpool and Manchester. That appears to be taken as a basis of any income being earned by him at all. If that be so, there seems to be a justification for the figure which the learned President has reached, which is that the total sum which will probably be

obtained over a series of years by this professional gentleman, both from his investments and from his earnings, will reach a total of 7500*l*. Obviously that does not have regard to the year 1927 only; clearly it takes into account the possibilities and the success which has been achieved by this gentleman in the past and looks forward to some success being once more attained by him. It would appear to me to be quite wrong to focus attention on this last year and the decrease in the last three years only; some estimate must be made—and it can only be estimate—of the future income of this husband. Looking, therefore, at facts which I think the President was entitled to take into consideration, and looking forward to estimates which I think the learned President was right to consider, and, indeed, ought to consider if he is fixing a sum to be paid during the joint lives of the husband and wife, he has taken his figure at 7500*l*., and he has founded on that a disposable surplus which I think he works out at about 4800*l*.

It may be that the success of the husband will be far greater; it may be that he will regain the prosperity which he has undoubtedly enjoyed in the past and which has enabled him to put away a considerable sum in savings. If so, the fixing of this sum may work in his favour. True it is that the wife may, under sub-s. 2 (b), ask for an increase in the amount of the maintenance, but at least it could be answered to any such application that the figures which are now reached are based not merely upon the figures of the past but also upon an estimate for the future.

On the whole, therefore, it appears to me that the learned President has directed himself according to right principles and with regard to those principles which he has stated in *Dayrell-Steyning v. Dayrell-Steyning*. (1) I do not desire to add anything to them; they seem to me to be quite clear, and if I were to follow the matter which has been dealt with therein, both as to the deduction of income tax and the like, I should be only very likely darkening what is at the present time clear. The matter is one for the exercise of

(1) [1922] P. 280.

C. A.

1928

SHERWOOD

v.

SHERWOOD.

Lord Hanworth
M.R.

C. A.
1928
SHERWOOD
v.
SHERWOOD.
—
Lord Hanworth
M.R.

discretion in figures in which there is so wide a range that it is quite possible to come to a different estimate with regard to the future ; but as the President, as I have said, rightly directed himself, I forbear to criticize too closely the estimate which he has made and which he was entitled to make upon the materials before him, having regard to the fact that he had to estimate for the future.

With regard to the 400*l.* which is to be secured, it is pointed out that there has been a heavy capital depreciation in respect of one or more of the investments which are held by the husband. In particular, there has been a heavy depreciation in international holdings and hydro-electric securities between June 30 and July 31, 1928. It has been said in many cases, and I repeat it, that to make an estimate of the value of a security by attention to a very short period of time is not justifiable ; you have to ascertain the value of the security not merely according to the market value on any particular day ; but you have to look at the prospect as well as the retrospect, and to estimate a depreciation because in the course of three weeks there had been a fall with regard to these particular holdings appears to me to form an insufficient measure by which to estimate the value of these securities. They may be securities which are subject to considerable fluctuations ; they may be securities in regard to which a good deal of influence on their price and value comes from the market ; I do not know ; but it appears to me that it is right with regard to these investments to look at them as a whole, and not to take a particular rise or fall during any short period like that of a few weeks.

Looked at from that point of view, it appears to me that although at the present time and although in the future, owing to depression, there may be a smaller income, yet there is no doubt about it that the husband's income from these securities is round about 1000*l.* a year. I am taking his answer, which it is true was made in January last ; he says this : " In addition to the aforesaid I am possessed of stocks shares etc., from which I derive an annual income of approximately 1090*l.*"

Let me cast aside the 90*l.* and leave it at 1000*l.*, or let me put it at the lower sum of 950*l.* Now if that be so, it must be borne in mind that that is not the sole source of income of the husband; that represents his savings. Is there any reason for saying that the registrar and the President who confirmed it have in their discretion come to a wrong conclusion that out of that sum 400*l.* should be secured? It is said that if investments have to be sold, they will be sold at a loss; that if gilt-edge securities have to be provided, it will be expensive and will affect more than an aliquot portion of these securities; that it will not be merely 400*l.* out of 1000*l.* that will be secured, but that the capital value required will eat into a larger sum than would enable the husband still to receive the balance of 600*l.* from the total of 1000*l.* derived from the securities. That may be or may not be; but it appears to me that it is for the registrar and for the President to take all these various factors into consideration in estimating what is the sum of which the husband is possessed, and inasmuch as they have reached the same figure, I forbear to say that their discretion ought to be in any way modified, and on that point I think the appeal fails also.

C. A.
1928
SHERWOOD
v.
SHERWOOD.
Lord Hanworth
M.R.

For these reasons I see no justification for altering the order made by the learned President, and the appeal will be dismissed with costs.

GREER L.J. I agree, and I only wish to add a few words on the point of principle raised by Mr. Cotes-Predy on behalf of the appellant. As I understand the point, it is this: it is said that in the case of *Dayrell-Steyning v. Dayrell-Steyning* (1) the President laid down a rule of law from which he departed in his decision in this case, and that that rule of law was right and ought not to have been departed from. It seems to me that that argument is unconvincing in two respects. First of all, I am clearly of opinion that the President was right in his decision in this case in saying he laid down no such rule of law as that contended for; and, secondly, I am

C. A. also equally clearly of opinion that if he had laid down any
1928 such rule of law, it would have been hopelessly bad.

SHERWOOD
v.
SHERWOOD.
Greer L.J.

It is suggested that the rule of law that was laid down was that in fixing the amount which is to be paid in the future in respect of the maintenance of the wife you are bound to look only to the year before the order for maintenance is made and then give one-third of the disposable income for that year. If it happened, as it might well happen, that during that year a professional man was ill and had no income, but had to pay income tax upon the previous three years, or it may be, at the present time, on the previous year, his disposable income for that year would be a minus quantity which would have to be divided into three parts, of which the wife would have one. That cannot be a rule of law and it is impossible to deduce any such rule from *Dayrell-Steyning v. Dayrell-Steyning*. (1) What happened in that case was that there was nothing before the Court to show that that particular year was in any way an exceptional year. It was, therefore, taken by the President, and nobody objected to its being so taken, as a fair representation of what might be expected in the future. So treating it, he took it as the basis on which he found the disposable income. But it does not follow from that that in every case the year immediately before the final order is made affords any real evidence as to what the future will bring forth, and in any case it is obvious that the judge or the registrar in making the order for maintenance is bound to consider what the income is likely to be out of which the wife's maintenance is to come.

For these reasons I think the learned judge was quite right on the question of principle. As to the question of amount, because it may be shown that here and there some mistake has been made in the arithmetic, it does not follow that this Court ought to upset the finding of the learned judge below, unless it is of opinion, taking all the circumstances together, that the amount awarded was something more than could reasonably be awarded under the provisions of the statute.

(1) [1922] P. 280.

For these reasons I think the appeal must be dismissed with costs.

C. A.

1928

SHERWOOD

v.

SHERWOOD.

RUSSELL L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Croft & Russell.*

Solicitors for respondent: *Lewis & Lewis.*

W. I. C.

STATHAM, J. T. v. STATHAM, J. C.

C. A.

1928

Divorce—Charge of Sodomy with Wife—Need for corroborative Evidence—Cruelty—Acts of shameless Uncleaness—Failure to define legal Cruelty in summing up.

Nov. 9, 12,
13, 14, 15;
Dec. 3.

In the case of divorce proceedings based on sodomy, the same cogent evidence is required to overcome the presumption of guilt as in a criminal case, and the same duty rests on a judge in summing up to a jury to warn them of this and that they ought not to find the offence to be proved on the uncorroborated evidence of an accomplice.

N. v. N. (1862) 3 Sw. & Tr. 234, 238; *Reg. v. Jellyman* (1838) 8 Car. & P. 604; *Rex v. Tate* [1908] 2 K. B. 680; and *Rex v. Baskerville* [1916] 2 K. B. 658 applied in principle.

A husband and wife intermarried in February, 1922, and continued to cohabit until July, 1927, when the wife left the husband. On November 2, 1927, the wife petitioned for a divorce founded upon an act of sodomy alleged to have been committed on her by the husband in March, 1922, and alleged acts of cruelty consisting of (a) acts of shameless uncleanness and invitations to repeat them, and (b) ordinary acts of cruelty, such as acts of ill-temper and abuse.

At the trial Hill J., in summing up to the jury (as the Court of Appeal found), did not warn the jury against finding that the sodomy alleged had been committed on the uncorroborated evidence of the wife, who was an accomplice; nor did he clearly point out that before it could be held that there was cruelty as regards the sexual malpractices, it must be shown that they caused danger to life, limb or health, bodily or mental, or a reasonable expectation of it.

The jury's verdict was (1.) that sodomy had been committed as alleged, (2.) that the husband had been guilty of cruelty of class (a), and (3.) that he had not been guilty of cruelty of class (b). Hill J. then made a decree nisi for dissolution of the marriage. On appeal:—

Held, (1.) that the judge ought to have warned the jury that cogent evidence was required to overcome the presumption of innocence of sodomy, and that they should not convict on the wife's uncorroborated

C. A.

1928

STATHAM,

J. T.

v.

STATHAM,

J. C.

evidence; (2.) that the Court must take notice of the fact that there had been condonation of the offence, even though the husband did not plead it; (3.) that Hill J. had misdirected the jury by saying that the sexual malpractices were cruelty in themselves, as there could not be legal cruelty without danger to life, limb, or health, physical or mental, or reasonable apprehension of it; and (4.) that instead of directing a new trial the Court should dismiss the wife's petition.

Per Greer and Russell L.JJ. The wife having on the evidence been a consenting party to the act of sodomy alleged to have been committed, it would be impossible for her to obtain a decree of divorce based solely on that act.

APPEAL from Hill J. and a special jury.

The following statement of facts is taken from the judgment of the Master of the Rolls :—

The marriage of the respondent John Charles Barron Statham with the petitioner Jessie Throsk Statham was solemnized on February 4, 1922, the age of the husband being forty-nine years and that of the wife twenty years. The husband was a big game hunter, and with his wife started upon an expedition from Portuguese West Africa in March, 1922, which lasted until April, 1923. On their return to England they acquired the Manor House, Loose, near Maidstone, where they lived together as man and wife continuously till July, 1927, except for a visit which they made together to Tunis from December, 1925, to March, 1926, and to Algiers for a few weeks in December, 1926. In July, 1926, there was a temporary quarrel, and the wife left the Manor House for a fortnight or thereabouts. In July, 1927, the wife left Loose and did not return. On August 3 the husband wrote to his wife expressing surprise at her departure, and a hope of her return. This was answered on August 9 by the wife's solicitors, who charged the husband with cruelty in temper towards, and abuse of, his wife, and asked what terms of separation could be arranged. On August 10 the husband's solicitors gave a denial to these charges and hoped for a reconciliation. On August 19 the wife's solicitors tabulated the charge of cruelty described above and insisted on a separation. On August 26 the husband wrote to the wife an affectionate letter, while his solicitors repudiated seriatim the charges of cruelty set out in the solicitors' letter of the 19th. Further letters passed. On

September 6 the wife's solicitors stated that she would not return and complained of the husband's conduct as above, which had "rendered her life intolerable and seriously affected her nerves." On September 7 the husband's solicitors again offered the wife to return home and declared that the husband would resist the allegations made against him. On September 15 the wife's solicitors wrote that if an adequate allowance were provided for the wife there would be no necessity for legal proceedings. On the next day the husband's solicitors replied that so long as the wife persisted in her charges the husband would not consider a separation or discuss the matter. On September 22 the wife's solicitors wrote that there were very grave charges which the wife had now reluctantly revealed to her advisers, and in reply the husband's solicitors answered that they were unable to take instructions from the husband, as he was to undergo immediately an operation in a nursing home, as in fact he did. While he was thus away from the Manor House the wife and her father paid one or more visits to the house and brought away from it some books from the husband's shelves, which the wife indicated as containing accounts of depraved vice. Three of the books were in German and one in French.

The petition was dated November 2, 1927. It prayed for a divorce founded upon an act of sodomy committed upon the wife on March 12, 1922. It also alleged acts of cruelty which it is unnecessary to specify herein. They may be classed (*a*) as acts of shameless uncleanness and invitations to a repetition of them, and (*b*) acts of cruelty more generally known—such as acts of ill-temper, abuse and the like. The case was tried with a jury before Hill J. on July 3, 4, and 5, 1928.

The nature of the evidence given at the hearing sufficiently appears from the judgments.

Hill J., in the course of his summing up to the jury, said that the first charge was the specific charge of sodomy on March 12, 1922, the second charge was with regard to practising filthy sexual conduct or invitation so to do, which was said to have continued thereafter up to a short time

C. A.

1928

 STATHAM,
J. T.
v.
STATHAM,
J. C.

C. A.
1928

STATHAM,
J. T.
v.
STATHAM,
J. C.

before the final parting in July, 1927, according to the petitioner. The sodomy was not said to have been repeated, but it was said to have been solicited on two or three other occasions. The law was that solicitations to sodomy or other beastly acts were in themselves cruelty, unless indeed they proceeded at the invitation or with the consent of the wife. Of course, a fortiori, the doing of them was in itself cruelty and a ground for divorce, provided always that it was without the real consent of the wife. Unless she was a willing actor, the doing of these acts, or the solicitation of a wife who was not herself a willing actor in the matter, was cruelty. After referring to some of the alleged beastly sexual acts, his Lordship pointed out that what was alleged here was first sodomy committed, secondly acts of cruelty in the matter of those filthy sexual acts, and thirdly, what might be called ordinary cruelty, charges of making the wife do a terrible amount of hard work and of violent temper. Charges of cruelty and violent temper were often made by a wife against her husband. The law was that conduct calculated to injure the health of the wife in mind or body and having that effect was cruelty, even though it involved no actual physical act, no actual physical violence; but, of course, that must be conduct against her will of such a nature as to affect her health in mind or body.

Coming to the two main charges, the charge of sodomy and the charge of those other bestial acts, the jury in coming to a conclusion on them would have to rely almost entirely upon the evidence of the woman on the one hand or of the man on the other. In the very nature of things, the woman's charges must depend on her own evidence. On the other hand, the man, if he were innocent, had no means of disproving the woman's charges except his own word. Therefore it became of extreme importance to consider what was their estimate of these two as seen in the box and having regard to the ways in which they gave their evidence. One always, in these cases, hunted about to see if there was anything that helped. Many matters had been dwelt upon proper for their consideration. It was not suggested that the wife is

a hysterical woman, but on the contrary that she was a designing woman, saying that which was untrue either by her own wicked invention or prompted thereto. The jury would ask themselves why, if she was going to invent a charge of sodomy, she invented only one occasion and put it back as far as March, 1922. He did not know whether she knew anything of the law, but it was obvious to any one who did that the offence had been condoned by her having returned to live with her husband for some years, and could only be revived by subsequent marital offences such as cruelty. On the other hand, it might equally be asked on behalf of the husband why he told them about one of the alleged beastly sexual acts, saying he had done it on two or three occasions at the wife's invitation, unless he was otherwise telling the truth. The jury had also to ask themselves how these matters came into the mind of the parties. It must be considered whether the wife had the French book that had been referred to in the evidence and could read it, or whether the husband gave it to her and told her to read it with a view to exciting her sexual appetite. As to the German books referred to, it was not suggested that the wife could read German. The jury must also consider why the wife did not complain before. Was the charge a late invention, or was there delay because there was a natural delicacy about speaking of it? The fact was that she did not tell anybody till September, 1927. There was evidence, however, that the German books were not removed from the house at Loose till October, so that it seemed pretty clear that the suggestion of the charges did not come from these books. [His Lordship then referred to further matters for the general consideration of the jury in deciding on the main charges, and after dealing with the charge of ordinary cruelty, left the following questions to the jury: (1.) Whether the husband was guilty of sodomy; (2.) Whether he had been guilty of cruelty either (a) in respect of improper sexual practices, or (b) otherwise.] The verdict given was: (1.) That the husband had committed sodomy as alleged; (2.) that the husband had been guilty of cruelty (a) as above; (3.) that the husband had not been guilty of cruelty (b) as

C. A.

1928

 STATHAM,
 J. T.
 v.
 STATHAM,
 J. C.

C. A. above. Hill J. thereupon made a decree nisi for the
1928 dissolution of the marriage.

STATHAM,
J. T.

The husband appealed.

v.
STATHAM,
J. C.

W. O. Willis K.C. and *N. Middleton* for the appellant. There is no sufficient evidence that sodomy was committed. In regard to such a heinous offence the evidence must be specially cogent: *Geils v. Geils* (1); *N. v. N.* (2) There was really no valid evidence at all here, but in any case Hill J. ought to have warned the jury that cogent evidence was required. There is no difference in what is required in the summing up in civil or criminal proceedings. A consenting wife is an accomplice, and corroborative evidence is necessary: *Reg. v. Jellyman* (3); *Rex v. Tate* (4); *Rex v. Baskerville.* (5) It was the duty of the judge to warn the jury against finding the husband guilty of the offence on the wife's uncorroborated evidence. Corroboration is also required of cruelty: *Judd v. Judd* (6); and see *Mogg v. Mogg.* (7)

Again, the act of sodomy had been condoned, and it was necessary to show that the offence was revived by subsequent cruelty. The only cruelty found is in respect of improper sexual practices. But, as in the case of ordinary cruelty, such acts are not cruelty unless they were injuries to or tended to injure the wife's health. That ought to have been pointed out by Hill J. in his summing up. In fact he said that such acts were cruelty in themselves. Further, there is no evidence that the wife's health suffered.

[RUSSELL L.J. The husband's defence contained no allegation of condonation.]

It is a matter of which the Court will take notice without its being pleaded: *Curtis v. Curtis* (8); *Moosbrugger v. Moosbrugger.* (9)

[LORD HANWORTH M.R. referred to *Durant v. Durant.* (10)]

(1) (1848) 6 N. C. 97.

(6) [1907] P. 241.

(2) (1862) 3 Sw. & Tr. 234, 238.

(7) (1824) 2 Add. 292.

(3) (1838) 8 Car. & P. 604.

(8) (1859) 4 Sw. & Tr. 234.

(4) [1908] 2 K. B. 680.

(9) (1913) 109 L. T. 192; 29

(5) [1916] 2 K. B. 658, 663.

Times L. R. 715.

(10) (1825) 1 Hagg. Ec. 733, 751.

Other cases with regard to condonation are *Keats v. Keats and Montezuma* (1) and *Palmer v. Palmer* (2) ; see also *Dent v. Dent*. (3)

C. A.
1928

STATHAM,
J. T.
v.
STATHAM,
J. C.

Cotes-Preedy K.C. and *Bush James* for the respondent. It is contended that the strict rule as to evidence on which a conviction for sodomy can be made does not apply to proceedings in the Divorce Court. It was never submitted at the hearing that there was no case to go to the jury on this charge. The strict rules of evidence do not in all cases apply in the Divorce Court. There was an instance of that here. Some evidence had been given that the wife had made complaints. It was contended that this was not evidence, and Hill J. said he himself had been surprised when he first dealt with divorce cases to find it was. Moreover there was some corroborative evidence here. In this connection the German books were material which showed that the husband was a person of a depraved taste. The jury are entitled to have regard to the kind of literature the husband kept.

[LORD HANWORTH M.R. The mere fact that the books were on his library shelves did not justify the drawing of inferences against his morality.]

There was evidence that he had read some portion of the books. His own evidence is that the wife asked him to read them to her.

Further, as to the unclean acts, it is suggested that they alone amount to cruelty entitling the wife to some relief, irrespective of injury to health.

[GREER L.J. That is contrary to *Russell v. Russell*. (4)]

In any case, there is evidence of injury to health, and it is not correct to say that Hill J. in summing up did not direct the jury to that effect. It is submitted that Hill J. in summing up said all that he ought to have said on the case.

[They also referred to *Reg. v. Wollaston*. (5)]

W. O. Willis K.C. in reply. The wife was a party to what is said to have taken place in 1922 and consented to it. Her

(1) (1858) 1 Sw. & Tr. 334.

(3) (1865) 4 Sw. & Tr. 105.

(2) (1860) 2 Sw. & Tr. 61.

(4) [1895] P. 315.

(5) (1872) 12 Cox, 180.

C. A. evidence therefore requires corroboration, and the learned
 1928 judge ought so to have warned the jury : *Rex v. Baskerville*. (1)
 STATHAM, That alone is ground for new trial. But it is contended that
 J. T. this is a case where there ought not to be a new trial but the
 v. petition ought to be dismissed. There can be no corroborative
 STATHAM, evidence.
 J. C.

The Court of Appeal can so hold, even though in the Court below the point was not taken that there was no case to go to the jury : *Banbury v. Bank of Montreal* (2) and Annual Practice, 1929, p. 1206 ; see also *Rex v. Baskerville*. (3)

Cur. adv. vult.

Dec. 3. LORD HANWORTH M.R. In this case on July 5, 1928, after a verdict given by a jury, Hill J. granted a decree nisi for a divorce upon the petition of the wife. The husband appeals, and asks that the petition should be dismissed on the ground that there was no evidence to go to the jury in support of it, or alternatively that a new trial should be ordered on the ground of misdirection of the judge. [His Lordship then stated the facts as set out above and continued :] It is obvious that a number of questions of law arise upon the matters and issues raised in the case and upon the result reached. They may be stated as follows : (1.) What evidence can be accepted to prove the offence charged ? (2.) Was there not condonation ? (3.) What proof is required of the cruelty (a) and what amounts to such cruelty ? (4.) If proved, do such acts fall within s. 185 of the Supreme Court of Judicature (Consolidation) Act, 1925, and require the Court to order a judicial separation ?

First, then, as to the evidence necessary to prove the offence charged. It is quite clear from the authorities cited that cogent evidence is required to overcome the presumption of innocence where such a charge is made. As Sir Cresswell Cresswell said in *N. v. N.* (4) : “ The crime here imputed is so heinous and so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is

(1) [1916] 2 K. B. 658.

(2) [1918] A. C. 626.

(3) [1916] 2 K. B. 658, 663.

(4) 3 Sw. & Tr. 234, 238.

simply oath against oath, without any further evidence, direct or circumstantial, to support the charge." The same principles apply in my judgment in divorce proceedings as in a criminal court, for it is the very nature of the charge, easy to make and difficult to repel, which demands such proof as is adequate to establish the guilt of the person charged in the minds of reasonable men. Whatever may be the consequences to the party charged, whether it be in a criminal court, punishment, or in a civil court, loss of status, the nature of the fact remains the same; and that fact must be proved beyond reasonable doubt with due and cautious consideration of the witnesses and their evidence. As Lord Dunedin said in *Thompson v. Rex* (1): "The law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth as to guilt without causing undue prejudice to the prisoner." It is on this ground that the evidence of an accomplice is not accepted simpliciter and without corroboration: see per Patterson J. in *Reg. v. Jellyman* (2); and a conviction may be quashed in a Court of Appeal where the judge at the trial has omitted to caution the jury against convicting upon the uncorroborated evidence of an accomplice: see *Rex v. Tate*. (3) Further, that corroboration must be found in some material particulars tending to show that the accused committed the acts charged. It must be evidence which affects the accused by connecting or tending to connect him with the crime. See *Rex v. Baskerville*. (4) Now the wife was an accomplice. Furthermore, there is, according to her own story, strong evidence of consent on the part of the wife. Her evidence proves that what was desired was explained to her, and although in its very essence every person must realize that such an act is against nature, she accepted it until she found that it caused her pain. There was no corroborative evidence at the time the crime was committed in March, 1922. The evidence relied upon by means of extracts taken from the

C. A.
1928

STATHAM,
J. T.
v.
STATHAM,
J. C.
—
Lord Hanworth
M.R.

(1) [1918] A. C. 221, 226.

(2) 8 Car. & P. 604.

(3) [1908] 2 K. B. 680.

(4) [1916] 2 K. B. 658.

C. A. German books and laid before the jury was most unsatisfactory. It is unnecessary to deal with the French book separately, and there is a dispute as to how it came into the possession of either the husband or the wife. The chain suggested to connect these extracts with this husband appears to have been that a man who had such books in his possession would be likely to engage in the act or acts charged. The passages that were translated and handed to the jury were passages which gave an account of depraved and filthy conduct and of perverted vice. No evidence was given which connected the husband with those particular extracts. There was some evidence that the husband and wife had discussed the books when they were unpacking them at Loose on their arrival from the Cameroons, where they had been on the shelves of the German quarters occupied by the husband, and that the husband had told the wife the nature of the books and translated some paragraphs in them to establish his description of them. But there was not any evidence that he had read the passages laid before the jury, or that he had read the books for pleasure, or at all. Those excerpts were such that they could not fail to influence the jury when placed before them at large as evidence against the husband. Further there was no warning by the judge as to the necessity of corroboration of the wife's evidence upon such a charge apart from her being an accomplice. The warning is not required by any enactment; but the necessity for it is illustrated by the case of *Rex v. Tate* (1), although after the warning the jury may feel able, and if so are entitled, to accept the evidence actually presented to them without corroboration and give their verdict upon it: see per Lord Alverstone (2) and the cases there referred to and *Rex v. Baskerville*. (3) The absence of this warning and the loose way in which the extracts from the books were placed before them makes the verdict of the jury in my judgment unsatisfactory, and I cannot hold that the verdict on this main charge, which is categorically denied by the husband, can stand.

(1) [1903] 2 K. B. 680.

(2) [1908] 2 K. B. 682.

(3) [1916] 2 K. B. 663.

Next as to condonation. After the act charged against the husband the spouses lived and cohabited for more than five years and during this time lived happily together, for the letters produced reveal both affection and interest in each other. It was thus apparent that there was strong evidence of condonation. It was contended on behalf of the wife that condonation was not pleaded by the husband. This omission was for reasons which are obvious. None the less in my judgment it is the duty of the Court to take it into consideration as a matter of law, and this was the decision of the full Court which was presided over by Lord Campbell C.J. and included Martin B. in *Curtis v. Curtis*. (1) This decision was followed in *Moosbrugger v. Moosbrugger* (2), where Sir Samuel Evans dealt with the question of condonation as one of law for the judge to decide, whether or not it had been pleaded, for the Court has a duty to the public in matters of divorce and not merely to the parties before it: see *Harriman v. Harriman*. (3) Upon the facts of this case it is clear to my mind that there was condonation which cannot be overlooked, and such condonation as would operate to wipe out all the acts charged right down to the final rupture in July, 1927, except for one answer made by the wife in her evidence as to cruelty (*a*), which was relied upon to revive the charge of sodomy: “(Q.) I want to find out if you can tell me up to how long before you finally left your husband in July, 1927, were these revolting suggestions made, how long before you left? (A.) Up to just before I left.” No question was put to the jury in reference to this evidence, for instance, as to whether these “suggestions” were the cause of her departure. It must be observed too, as appears from the letters that I have referred to, that no charge in respect of these matters was made until a separation accompanied with adequate provision for the wife was definitely refused by the husband, who demanded that the charges of cruelty (*b*) should first be withdrawn.

C. A.

1928

STATHAM,

J. T.

v.

STATHAM,

J. C.

Lord Hanworth
M.R.

(1) 4 Sw. & Tr. 234.

(2) 29 Times L. R. 715.

(3) [1909] P. 123.

C. A. Next as to the cruelty. Cruelty (*b*) was negatived by the
1928 jury. The judge rightly directed them in law upon that
STATHAM, matter in accordance with the definition of legal cruelty laid
J. T. down by Lopes L.J. in *Russell v. Russell* (1): "There must
v. be danger to life, limb, or health, bodily or mental, or a
STATHAM, reasonable apprehension of it." We cannot find any such
J. C. direction in reference to cruelty (*a*). There is a passage in
Lord Hanworth the summing up which may have been intended to embrace
M.R. both cruelty (*a*) as well as cruelty (*b*); but it is not clear
that it does so. In view of the explicit statement previously
made by the judge: "Short of that (consent, not mere
submission), in my view the doing of these acts or the solici-
tation of a wife who is not herself a willing actor in the matter,
is cruelty," it is difficult not to think that there may have
appeared to the minds of the jury to be a differentiation
indicated by the judge between cruelty (*a*) and cruelty (*b*),
namely, that whereas in the latter injury to health was an
essential ingredient it was not so in the former. Yet in my
judgment the definition given above must be satisfied as
well in respect of both classes of cruelty. This is clear from
the judgments in *Russell v. Russell*. (1) Without evidence
of danger to health, or of reasonable apprehension of it, legal
cruelty is not established. It must be added that the
evidence of ill-health or of danger to health is vague and
inconclusive. It is not proved by the doctors called, and the
verdict of the jury on the question of cruelty (*b*) coincides
with this failure of proof. It is unfortunate that a close
examination of the summing up of so careful a judge as
Hill J. reveals these omissions. They are, however, important,
more particularly in a case which entails such overwhelming
results to the husband, if the charges are established. These
involve not only the consequent divorce from his wife, but
also the conviction of a crime of a peculiarly nauseous
character.

Upon a review of the whole of the charges made, apart
from the omissions in the summing up which have been
pointed out, I think the evidence upon which they were put

(1) [1895] P. 315, 322.

before the jury, evidence which went to the very root of the case, was not only unsatisfactory but unsound. It is therefore not possible to accept the verdict, and the question of making any order under s. 185 of the Judicature (Consolidation) Act, 1925, does not arise. There remains the question whether there ought to be a new trial or whether the petition ought to be dismissed. This is a difficult question. In view, however, of the evidence of the consent of the wife to the act at the time, of the distance of time which separated the act alleged from any charge made in respect of it, the condonation over a long period of time, the doubt whether there is any sure evidence on which the revival of the charge can be established, the negation of the evidence of cruelty which was the pretext for separation, and the abundant opportunity afforded of collecting all the available and material evidence, I have come to the conclusion that it would not be right upon this evidence to send the case for a new trial, and that the right order will be that the petition be dismissed with costs here and below.

C. A.

1928

STATHAM,
J. T.

v.

STATHAM,
J. C.Lord Hanworth
M.R.

GREER L.J. The petitioner in this case, Mrs. Jessie Throsk Statham, petitioned in the Divorce Division for a decree that her marriage with the respondent should be dissolved, and for such further or other relief as might be just. By her petition she based her claim on an allegation that in March, 1922, within a few weeks after their marriage the respondent by force and against her will committed sodomy with her, and that he was guilty of various acts of cruelty which she detailed in particulars, and which were of the two kinds mentioned in my Lord's judgment.

Before the case came on for trial the questions to be submitted to the jury were, according to the practice of the Divorce Division, settled by the parties. They were: (1.) Whether John Charles Barron Statham, the respondent, has committed sodomy on the person of Jessie Throsk Statham, the petitioner. (2.) Whether John Charles Barron Statham, the respondent, has been guilty of cruelty towards Jessie

C. A. Throsk Statham, the petitioner. These were the only issues
1928 raised by the pleadings. It follows that all other questions
which the evidence disclosed as necessary for determination
were for the judge and not for the jury : see *Moosbrugger v.*
Moosbrugger. (1) In summing up the learned judge, Hill J.,
asked the jury to deal separately with the charges of cruelty
which consisted of sexual malpractices and those which
consisted of ill-temper, abusive language, and compulsion to
do unsuitable work, etc. The jury found the allegation of
sodomy proved, and the sexual malpractices proved, but they
negatived the other alleged acts of cruelty.

STATHAM,
J. T.
v.
STATHAM,
J. C.
Greer L.J.

The respondent appeals to this Court, and asks that the petition should be dismissed with costs on the ground that there was no evidence on which the jury were entitled to decide either of the issues as they did. It is obvious from the nature of the charges made against the appellant that he could not afford to base his defence on anything but a denial of all the charges against him, especially the charge of sodomy. It is therefore not surprising that there is no plea of connivance, and no plea of condonation in his answer to the petition. When asked to make a decree of divorce or judicial separation, the Court is not confined to the issues raised by the parties, but is bound to consider any facts proved in the course of the case which disentitle the petitioner to the decree for which she asks. Sect. 178 of the Judicature (Consolidation) Act, 1925, provides as follows: " 178 (1.). On a petition for divorce it shall be the duty of the Court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to inquire into any countercharge which is made against the petitioner." It is curious that this section only speaks of the petitioner being accessory to or conniving at or condoning adultery, that is to say, the cause of divorce mentioned in sub-s. (a) of s. 176, and there is nothing about connivance or condonation of the causes of divorce mentioned in the first part of sub-s. (b), which include sodomy, but it is difficult to suppose that the

(1) 109 L. T. 192.

Court is bound to grant a decree for dissolution of marriage to a wife who upon her own evidence has consented to the act of which she complains. The rules with regard to condonation and connivance as a bar to a decree for divorce were well established in the practice of the Ecclesiastical Courts before the Act of 1857 : see the cases cited in Rayden on Divorce, 2nd ed., pp. 107-110, and especially *Curtis v. Curtis*. (1) In my judgment these rules apply to cases in which the ground alleged for divorce is sodomy.

C. A.

1928

STATHAM,
J. T.
v.
STATHAM,
J. C.
Greer L.J.

It seems to me impossible to say that where two people commit sodomy together, either of them is entitled to ask the Court for a decree based on an act to which he or she was a party, and if the facts appear in the evidence the judge, who is the guardian of the public interest, cannot shut his eyes to them. The evidence given by the petitioner in this case gives rise to the question whether the judge ought not to have come to the conclusion that she was a willing party to the act of sodomy of which she complained and was therefore disentitled to a decree of divorce in respect of it. It shows that she understood what the respondent was doing, that she turned over in order to enable him to do what he wanted, that she made no protest until she found it hurt her, that she then screamed, and that she never allowed him to do it again, because, as she says, it hurt her too much and she could not stand it again. If this stood alone it would, in my judgment, be conclusive that she was, equally with the respondent, guilty of the offence about which she complained in her petition. It is quite clear that the act was not done, as she alleges in her petition, by force and against her will. In cross-examination she stated that her husband was forty-nine, and that she was only twenty, and when asked whether she tried to prevent him she said : " No, I did not try to prevent him. I did as I was told. I did not know much about things when I was married." This falls far short of showing that she did not understand that what she was consenting to was wrong. She must have known that it was wrong, improper, and

(1) 4 Sw. & Tr. 234.

C. A.
1928

STATHAM,
J. T.
v.
STATHAM,
J. C.
—
Greer L.J.

unnatural, and she does not venture to say that she did not. There is no indication of any sort of duress exercised by the appellant, and it is noteworthy that when he suggested doing it again, she maintained her refusal without difficulty. In my judgment the learned judge ought to have dismissed the claim for divorce on the ground that the petitioner was a willing party to the act on which she founded her claim.

With regard to the question of condonation, it is quite clear from the petitioner's own evidence that down to a very late date she had condoned the act of sodomy by cohabitation which continued, with the one interval in 1926, down to the time when she and the respondent separated in 1927; but it is said that the right to complain of the sodomy was revived by reason of the sexual cruelty of which the respondent was found to be guilty by the verdict of the jury, because she says the acts and suggestions complained of continued until just before she left in July, 1927. Condonation is conditional forgiveness and deprives the injured spouse of the right to claim a dissolution of marriage or a judicial separation based on a matrimonial offence which has been condoned by subsequent cohabitation. But the condonation may itself be blotted out, and the right to complain of the condoned offence may be revived if after a condonation a new matrimonial offence, such as cruelty, is committed. But in the present case cohabitation continued except for a short period in 1926 until the parties separated in 1927 for a reason that had nothing whatever to do with the sexual malpractices or suggestions on which the jury based their finding of cruelty. It is therefore impossible to hold that the right to complain of sodomy has been revived. If I am right in this view condonation affords another reason why the petition for divorce should be dismissed. But inasmuch as the learned judge upon the petition might have granted a decree for judicial separation, it is necessary to consider whether the petition so far as it is a claim for judicial separation ought to be dismissed, or whether a new trial ought to be ordered on that part of the case. In my judgment this claim also ought to be dismissed. The finding of the

jury with regard to the cruelty which consisted of sexual malpractices would not justify an order for judicial separation, if the Court thought that the evidence conclusively showed that these matrimonial offences had been condoned, and that there was no evidence justifying a finding that after condonation there had been a renewal of matrimonial offences.

For the reasons already expressed with regard to the question of condonation as affecting the charge of sodomy, I am of opinion that all the acts complained of in the form of sexual malpractices were condoned by cohabitation down to the time when the parties separated in July, 1927, and there is nothing whatever to show that cohabitation ceased after the last of the filthy acts and solicitations which the jury have found to be cruelty. It seems to me that on this ground the petition, so far as it covers a claim for judicial separation, must also be dismissed.

Having regard to the conclusions arrived at as already stated, it is, strictly speaking, unnecessary to deal with the questions much discussed at the trial with reference to misdirection as to cruelty, and as to the need for corroboration on the charge of sodomy, but it may prove useful for the Court to express its views on these points, as they bear upon the question as to whether there could in any event on the findings in this case be any better result possible for the petitioner than a new trial on the ground of misdirection. I agree with the Master of the Rolls that there was misdirection in relation to the charge of cruelty which consisted of sexual malpractices. The learned judge used these words in summing up: "The law is that solicitations to sodomy or other beastly acts are in themselves cruelty unless indeed they proceed at the invitation or with the consent of the wife. Of course a fortiori the doing of them is itself cruelty and a ground for divorce, provided always that it is without the real consent of the wife . . . it is not that she has submitted or that it is forced upon her, but that she is really agreeing to the act, that she is a willing actor. Short of that, in my view the doing of these acts or the solicitation of a wife who is not herself a willing actor in the matter, is cruelty." Having

C. A.

1928

 STATHAM,
J. T.

 v.
STATHAM,
J. C.

 Greer L.J.

C. A. regard to these words I cannot read the words which appear
1928 later in the summing up with reference to the injury to health
STATHAM, in mind or body as having any reference to the kind of cruelty
J. T. which consisted of sexual malpractices, and I think the jury
v. were probably misled by the distinction which appears to
STATHAM, be drawn between the two kinds of cruelty. They may have
J. C. thought that the sexual malpractices had not caused any
Greer L.J. injury to the petitioner's health, but that they still amounted
in law to cruelty. It is to be observed that they negatived
the cruelty which the learned judge told them had to result
in injury to health, and they found the cruelty with regard
to the acts and solicitations as to which the judge had told
them that they were in themselves cruelty. In my view
therefore, on this part of the case there was misdirection on
which a new trial would have been ordered, if we had not
on other grounds decided to dismiss the petition. After the
definition of cruelty given by the Court of Appeal in *Russell v.*
Russell (1), affirmed by the House of Lords (2), it seems
reasonably clear that it is a misdirection to tell a jury that
any acts relied on in support of a plea of cruelty can amount
to cruelty in law in the absence of any injury to health of
body or mind or reasonable apprehension of such injury.
I do not think one can say that if properly directed the jury
would have been wrong in finding that the malpractices
did affect the health of the petitioner. There are to be found
in Mr. Macquisten's evidence some facts stated which do
amount to evidence which the jury might think sufficient to
justify a finding that these continued malpractices had in
fact affected from time to time the health of the petitioner.
The evidence is not very convincing, but I cannot say there
was no evidence, and that therefore the petition ought to be
dismissed on this ground.

I also think the judge misdirected the jury in failing to give
them a proper warning as to the danger of finding sodomy
on the evidence of the wife alone. As the point was very
much discussed, I desire to add that I agree that in cases
of this sort it is right that the judge should give to the jury

(1) [1895] P. 315.

(2) [1897] A. C. 395.

a warning similar to that which Sir Cresswell Cresswell gave to himself in the case of *N. v. N.* (1), and that the absence of such warning amounts to a misdirection which justifies an order for a new trial, but I do not agree that as a matter of law the jury cannot act on the evidence of an accomplice, or on the evidence of a victim of sodomy alone, if after a proper warning they come to the conclusion that they still can believe such evidence. If after proper warning a jury come to the conclusion that they can believe the complainant notwithstanding the absence of corroboration, the Court will not disturb the verdict merely on the ground of absence of corroboration: see *Rex v. Tate* (2); *Rex v. Baskerville*. (3) In *Rex v. Tate* (2) Lord Alverstone quotes with approval the statement of the law made by Cave J. in *In re Meunier* (4), that there is no power to withdraw the case from the jury for want of corroborative evidence provided the jury is cautioned in accordance with the ordinary practice. In *Rex v. Baskerville* (3) Reading L.J. says, in giving the judgment of the Court: "If after the proper caution by the judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances." It seems to me impossible to hold that the absence of corroboration in this case would of itself have justified this Court in holding that the petition should be dismissed. I think it would, if it were the only point in the case, only entitle us to say that, inasmuch as there was no proper warning, there ought to be a new trial.

For the reasons stated in the earlier part of my judgment I agree that the right order to make is that the appeal be allowed and the petition dismissed.

RUSSELL L.J. (5) I agree with the judgments already delivered. Before, however, considering whether it is open

C. A.

1928

 STATHAM,
 J. T.
 v.
 STATHAM,
 J. C.
 —
 Greer L.J

(1) 3 Sw. & Tr. 234, 238.

(3) [1916] 2 K. B. 658.

(2) [1908] 2 K. B. 680, 682.

(4) [1894] 2 Q. B. 415, 418.

(5) His judgment was read by Lord Hanworth M.R.

C. A. to us and proper for us to dismiss this petition I desire to
1928 state shortly why the verdict obtained at the trial should in
STATHAM, any view be set aside. There are, in my opinion, several
J. T. features in this case of a nature so unsatisfactory that a
v. verdict which may have been affected or influenced by them
STATHAM, ought not to be allowed to stand.
J. C.
—
Russell L.J.

1. In the first place, in regard to sodomy, there is no evidence of the commission of this offence except the statement of the wife. The offence of sodomy is an offence of so serious a nature that a rule has grown up, that in criminal trials for certain offences (which include sodomy) the judge must warn the jury of the seriousness of convicting, in the absence of some evidence to corroborate the story of the other party to the act alleged. If no such warning has been given a conviction will be quashed. Notwithstanding the warning the jury may convict—but the warning must be given or the conviction will not stand.

Is this rule to be confined to criminal trials for the offence? I can see no reason why it should be so confined. It cannot be that the reason for the rule is to be found in the fact that imprisonment is the result of an adverse verdict; the rule must be based on the nature of the offence charged and the privacy which is normally associated with it. On the one hand the corroboration is necessarily difficult to obtain; on the other hand, unless juries act with extra care, a man may be at the mercy of an unscrupulous perjurer. Hence the necessity of a formal warning.

The same principles should in my opinion apply to all judicial proceedings in which the commission or not of sodomy is an issue to be determined in the case. If no corroboration exists, the jury may still find that the offence was committed, but they should first receive the warning. The corroboration which is required is corroboration in some material particular tending to show that the offence was committed by the person charged: *Rex v. Baskerville*. (1) In the present case I can find no trace of any such corroboration; the German books are no such corroboration. Nor can I find any warning by

(1) [1916] 2 K. B. 658.

the judge. It may be that the warning, if given, would have produced a different verdict ; or it may be not. I cannot tell. In the absence of any warning the verdict ought not in my opinion to stand.

I wish to add this, that had the warning been given and the same verdict returned then (if no other unsatisfactory feature had existed in the case) I would not have felt justified in upsetting the verdict merely because I might have taken a different view of the evidence. I could not have said that there was no evidence to support the verdict.

2. The second feature to which I desire to call attention is the direction of the judge on the subject of the alleged cruelty. It is to be observed that the primary object of the petition was to obtain a dissolution of the marriage. No doubt under the general prayer for further or other relief it would be open to the wife if she failed on the sodomy charge and established cruelty to ask for and obtain a judicial separation. If she succeeded in establishing sodomy, allegation and proof of cruelty would be unnecessary but for the special circumstances of this case. The sole act of sodomy alleged was alleged to have occurred in 1922. If it ever in fact occurred, there can be no doubt that it was condoned over and over again. From the wife's point of view it was essential to prove that it had been revived by some subsequent matrimonial offence—hence the necessity of proving cruelty, not for the purpose of obtaining a judicial separation but for the purpose of reviving the sodomy as a ground for divorce.

The cruelty alleged was of two kinds (a) what may be termed ordinary cruelty, such as violent fits of temper, cursing and swearing and physical injury ; and (b) cruelty by means of filthy sexual practices and solicitations to filthy practices.

The jury found as to (a) in favour of the husband. As to (b) they found the husband guilty of cruelty in relation to sexual practices.

Now according to the definition laid down and approved in *Russell v. Russell* (1) it is necessary, in order to establish

(1) [1895] P. 315 ; [1897] A. C. 395.

C. A.

1928

STATHAM,

J. T.

v.

STATHAM,

J. C.

Russell L.J.

C. A. 1928 that the conduct complained of constitutes cruelty, that there be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. I turn to the judge's summing up and I find what appears to me to be a misdirection.

STATHAM,
J. T.
v.
STATHAM,
J. C.
Russell L.J.

He tells the jury that the law is that solicitations "to sodomy or other beastly acts are in themselves cruelty, unless indeed they proceed at the invitation or with the consent of the wife"; and a few lines further on—"the doing of these acts or the solicitation (i.e. by the husband) of a wife who is not herself a willing actor in the matter, is cruelty." In other words he has said nothing about the necessary ingredient of danger actual or apprehended to life, limb or health. True it is that a little later on when dealing with the case of what I have called ordinary cruelty he directs the jury correctly in using the following language: "The law, I think you must take it from me, is this, that conduct calculated to injure the health of the wife in mind or body and having that effect is cruelty even though it involves no actual physical act, no actual physical violence; but, of course, that must be conduct against her will of such a nature as to affect her health in mind or body." It was said that that direction was general in its terms and applied to both kinds of cruelty alleged, so that the jury were in fact given a correct direction. Having read the summing up very carefully I do not agree with this view. It seems to me that the judge has kept the two kinds of cruelty distinct throughout and has given a wrong direction as to the alleged cruelty by sexual practices. But even if the passage which I have last cited might properly be construed as relating to all the cruelty alleged, still it is not expressed with a clearness sufficient to undo the ill produced by the two earlier passages.

Had the jury been sufficiently directed on this point they would have had to consider whether there was any and (if any) sufficient evidence of injury to health actual or apprehended. For my own part I think there was none. The wife gave none; I can find none in the evidence of the doctors. The only trace of such evidence is a passage of the father's cross-examination when he stated that his daughter

always looked ill after she had been long with her husband. But the amount or weight of such evidence is for this purpose immaterial—the point is that the jury were told that the matters complained of amounted per se to cruelty. On this ground the verdict finding the husband guilty of cruelty in relation to sexual practices ought not to stand.

3. A further unsatisfactory feature exists in regard to the allegations of cruelty by sexual practices. I have already pointed out their importance in relation to condonation. Condonation is not pleaded by the husband and for obvious reasons; his case is an unequivocal denial of the sodomy charge, he declines to put forward any alternative plea based on an assumption that the sodomy charge is true. Nevertheless condonation must inevitably arise as an issue in the case. The sole ground for divorce is one act alleged to have occurred in March, 1922; the petition was presented in November, 1927, and the case proceeded upon the footing that (as was the fact) the parties, except for a brief interval of separation in 1926, lived together as man and wife until July 30, 1927.

In these circumstances the Court would have been bound to refuse a divorce unless this single offence had in some way been revived. Thus next to the issue of sodomy, the most vital issue in the case was the issue of revival. Yet this all-important issue is dealt with as a kind of after-thought in the following manner: “Hill J.: I am not sure that I must not ascertain how late the cruelty in relation to sexual matters continued, must I not? From the point of view of condonation are you finding the respondent guilty only in respect of Africa or after? The Foreman of the Jury: Sexual solicitation we took, my Lord, throughout. Hill J.: At Loose? The Foreman of the Jury: Solicitation throughout, my Lord. Mr. Bush James: Then, in my submission, sodomy is revived without question, as I understand the jury to find cruelty. Hill J.: They find there was solicitation to bestial sexual practices throughout. That brings you down to the time of July, 1927. Mr. Bush James: Then, my Lord, I ask for a decree nisi with costs. Hill J.: Yes.”

C. A.

1928

STATHAM,
J. T.

v.

STATHAM,
J. C.

Russell L.J.

C. A. At this point it is of great importance to see how the
1928 evidence stands in regard to these practices. [His Lordship
STATHAM, here dealt with certain acts and solicitations alleged in the
J. T. evidence.]

 I have called attention to all the matters as to which
STATHAM, specific evidence was given. No other evidence is given by
J. C. the wife except in general terms. She was asked after she
 had mentioned the various things above referred to, "were
 those practices of his continued when you got to the Manor
 House?" Answer: "He was always wanting me to do
 them." I ask myself what "practices" are referred to.
 No evidence had been given of any "practice" by the husband.
 It is impossible to say what the answer means. The only
 other evidence of the wife is this. She was asked: "How
 long before you finally left your husband in July, 1927, were
 these revolting suggestions made?" Answer: "Up to just
 before I left." Again I ask what "revolting suggestions"
 are referred to? It is again impossible to say what the answer
 means.

 Now consider how matters stood between these two spouses
 in regard to condonation. When the wife returned after
 the first parting in 1926 everything was condoned. About
 that there can be no doubt. From that time until July 30,
 1927, they lived together as man and wife; assuming that
 the sodomy is subsequently revived by cruelty occurring
 from time to time, equally must there be renewed condonation
 from time to time by the wife living with the husband. The
 slate is cleaned at short intervals. In these circumstances
 I should have thought that it was essential to establish
 revival with the greatest precision of detail as to the nature
 and time of the alleged act of revival. So far from this being
 done, the matter depends upon the single answer by the
 wife which I have cited. The jury are asked as an after-
 thought and answer airily: "Sexual solicitation we took,
 my Lord, throughout." Upon that the condonation, as
 to which no doubt can exist, is wiped out by some sexual
 solicitation by the husband of which the nature is uncertain
 and the date unknown. This question of revival, which once

sodomy was found by the jury, became the vital issue in the case, required for its proper decision precise evidence and precise findings of the nature and time of the act or acts relied upon as constituting revival. Upon this point also the matter should go back for a fresh trial.

4. A fourth unsatisfactory feature of the trial was the use made thereof of the German books. They came into the possession of the husband when the German colony in the Cameroons was occupied by British troops during the war: they were packed up with his belongings and sent to England, where they remained stored until they reached Loose in 1925. The evidence shows that the husband told the wife that they were dirty books, but there is nothing to show that any particular passages or extracts from the books were translated to the wife by the husband or even known by him to be found in the books. What happened at and in connection with the trial is this. Some one with sufficient knowledge of German perused the books on behalf of the wife and selected two or three extracts for translation into English. The extracts which were translated were of the filthiest possible description, at least I can conceive nothing filthier. These English translations were handed to the jury, who were invited by the judge to consider whether a man who had these books in his possession was not "therefore" likely to have committed the foul offences charged against him. It is not easy to imagine anything more calculated to inflame the jury against the husband than such a procedure, or any doctrine more dangerous than the theory that the possession of books is any evidence that the possessor practises the methods or perpetrates the deeds described therein. Upon the four grounds stated above I am satisfied that the jury's verdict cannot stand.

There remains for consideration the question whether the appellant is entitled to have the petition dismissed instead of the case being sent back for a new trial. So far as the petition claims a divorce it is based solely on one single alleged act of sodomy. That is its whole foundation. For the purpose of the point now under consideration I will assume that the

C. A.

1928

STATHAM,

J. T.

v.

STATHAM,

J. C.

Russell L.J.

C. A. wife's evidence is true and that the case is not complicated
1928 by condonation. Could the wife in these circumstances
STATHAM, obtain a decree of divorce? Before answering this question
J. T. it is necessary to scrutinize carefully the wife's evidence
v. as to sodomy. It is all contained in three consecutive questions
STATHAM, and answers in chief and one or two questions and answers
J. C. in cross-examination. Her evidence makes it clear (1.) that
Russell L.J. her husband explained to her quite plainly the exact physical
act which he wished to do upon her; (2.) that she assented and
placed her body at his disposal for the purpose of that act
being committed; (3.) that no compulsion of any kind was
brought to bear upon her; and (4.) that the only reason
given by her for refusing subsequent invitations to a similar
act was fear of pain. It thus appears that the wife was a
consenting party to the only act upon which a decree for
divorce could be founded. It is immaterial whether or not she
knew that the act to which she consented was called sodomy or
that it was a crime. The act was accurately explained to her
beforehand, she must have known that it was against nature,
yet she consented of her free will to its commission. In these
circumstances it is impossible for her to obtain a decree for
divorce based solely upon an act of the husband to which
she was a consenting party. The husband is entitled, in my
opinion, to have the petition for divorce dismissed.

This does not however dispose of the whole case. I apprehend that if at the trial her prayer for divorce had failed she might still have asked for judicial separation founded on the cruelty alleged. Is she entitled now to have the case sent back for a new trial in order to obtain, if she can, a decree for judicial separation on that ground? Upon this question I have felt some doubt, but I have come to the conclusion that she is not so entitled. We must assume I think that she placed before the Court the whole of the evidence available on the question of cruelty; and that a fresh jury would simply have to consider evidence of the same description as was given before, but under a proper direction from the judge. Is there any evidence or sufficient evidence to justify a finding by the jury of cruelty within the ambit of *Russell v.*

Russell (1) ? In my opinion there is not sufficient evidence or, indeed, any evidence worthy of the name, the solitary trace or hint of any such evidence consisting of the one answer cited above which was given by the wife's father in the course of cross-examination. That would not, in my opinion, justify a verdict of cruelty.

C. A.
1928

STATHAM,
J. T.
v.
STATHAM,
J. C.
—
Russell L.J.

In the result I am of opinion that we ought not to order any new trial, but that the appeal should be allowed, the verdict and the decree nisi set aside, and the petition dismissed.

Solicitors : *Shirley Woolmer & Co. ; Wedlake, Letts & Birds.*

H. C. G.

VIGON v. VIGON AND KUTTNER. (2)

1928
Dec. 21.

Divorce—Practice—Custody of Child—Previous Order of Court of Summary Jurisdiction—Variation of Order—Guardianship of Infants Acts, 1886 and 1925 (49 & 50 Vict. c. 27, and 15 & 16 Geo. 5, c. 45).

There is power in the Divorce Division to make an order for the custody of a child of parents who are parties to a suit for divorce notwithstanding an order made by a court of summary jurisdiction before the suit under the Guardianship of Infants Acts, 1886 and 1925, for the custody of the child. This can be done after a decree nisi of the Divorce Division dissolving the marriage of the parents.

HUSBAND'S PETITION for divorce.

On September 15, 1927, the wife obtained from a court of summary jurisdiction an order under the Guardianship of Infants Acts, 1886 and 1925, for the custody of the child of the marriage, a boy born on April 1, 1926. On December 12, 1928, the husband was granted a decree nisi for the dissolution of his marriage on the ground of the wife's adultery with the co-respondent. The petition contained a prayer for the custody of the child, but, on pronouncing the decree nisi, Bateson J. adjourned the question of granting custody to the husband for argument having regard to the fact that the magistrate's order in favour of the wife was still in force.

(1) [1895] P. 315.
(2) Reversed on the merits in C. A.
P. 1929.

April 19, 1929, the Court not dealing
with the question of jurisdiction.
N
5

1928
 VIGON
 v.
 VIGON
 AND
 KUTTNER.

H. Durley Grazebrook for the husband. There is no question but that the Court is competent to override the order of the inferior court. I rely on the Guardianship of Infants Act, 1886, ss. 6, 13, which sections are not touched by the Act of 1925. The administration of the 1886 Act is entrusted only to the High Court and to county courts, and s. 6 gives power to remove any guardian appointed by virtue of the Act. Further s. 13 enacts that: "Nothing in this Act contained shall restrict or affect the jurisdiction of the High Court of Justice in England . . . to appoint or remove guardians . . .", and that section concludes the matter. I also rely on the Guardianship of Infants Act, 1925, s. 3, sub-s. 4, which provides for variation or discharge by a subsequent order.

[He referred to *Manders v. Manders*. (1)]

S. R. Sidebottom for the wife. There is no power in this Court to vary the magistrate's order for custody. If the husband acts upon an order for custody granted to him here he will be within the mischief of the Act of 1925 under s. 7, sub-s. 5. Custody is not guardianship, and the Act of 1886 in ss. 6 and 13 deals with guardianship only. The Act of 1925, s. 7, sub-s. 1, now gives jurisdiction to courts of summary jurisdiction and the same court which makes the order must vary it. The magistrate can vary the order under s. 5 of the Act of 1886.

[He referred to *Barraclough v. Brown*. (2)]

Grazebrook in reply.

BATESON J. I give custody of the child to the petitioner. I think that I could vary the order of the court of summary jurisdiction under the Act of 1886, s. 5, but I do not wish to do so without that court having the opportunity of considering the matter. I propose to direct that the portion of the decree dealing with custody shall not be drawn up for one month. That will give an opportunity of informing the court of summary jurisdiction that I have found the wife guilty of adultery and that I think that the husband

(1) [1897] 1 Q. B. 474.

(2) [1897] A. C. 615, 620.

should have the custody of the child. I may point out that if the order of the court below can be said to deal with custody only and not to touch guardianship it follows that application to me under the Guardianship of Infants Act might produce the result of my making an order here giving guardianship to the petitioner, while the existing order of the court below still stood giving custody to the respondent.

Solicitors for the husband : *Romain & Romain.*

Solicitor for the wife : *H. E. Greville.*

R. M. M.

1928

VIGON
v.
VIGON
AND
KUTTNER.
Bateson J.

WEBB v. WEBB.

1929

Jan. 21.

Divorce—Variation of Marriage Settlement—Guilty Husband—No Issue—Interest of Husband in Settled Fund of Wife in event of his surviving—Ultimate Trust of Residue of Fund of Wife for her Next of Kin—Interest of Next of Kin preserved—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192.

By a marriage settlement the settled fund of a wife who had obtained a dissolution of the marriage was held in the absence of issue in trust, if the husband survived her, to yield him a specified income for a term with an absolute interest in a part of the corpus and subject thereto for her next of kin absolutely and if the wife survived, for her absolutely. The Court extinguished the interest of the husband in his wife's fund, but refused to order the fund to be reconveyed to her freed from the trust for her next of kin so as to extinguish their interest.

MOTION to vary the report of a registrar upon a petition for the variation of a marriage settlement.

On September 5, 1928, a decree nisi was made absolute, dissolving the marriage of Mabel Gertrude Webb and John Curtis Webb at the instance of the former. On September 7, 1928, she filed a petition for the variation of a settlement executed on the occasion of her marriage in 1898. There was no issue of the marriage. Under the settlement, which it was now sought to vary, the trusts of the settled fund of the wife in default of children (the event which had happened) were, if the husband should survive the wife, in trust to pay him the income for two years and after that period or his

1929
 WEBB
 v.
 WEBB.

death, if sooner, as to 2000*l.* part of the wife's fund in trust for the husband absolutely and as to the residue of the fund in trust for such persons as tenants in common as would have become entitled thereto if the wife had died possessed thereof intestate domiciled in Ireland and without having been married, but in the event of the wife surviving the husband then as to the entire fund in trust for the wife absolutely. The trusts of the husband's settled fund were irrelevant to the discussion. The submission of the report as to the wife's fund was that all rights, powers and interests of the husband in it should be extinguished. The wife moved to add to this part of the report the following, "and that the interests of all persons other than the wife in her fund be extinguished and the fund reconveyed to her free from the trusts of the settlement."

Ethel Mary Archer, married woman, had filed an answer to the petition for variation alleging that she was the only sister of the wife and, apart from an after taken husband of the wife, her only next of kin. E. A. Archer further set out in her answer that she had four children and she objected to any order being made on the petition which might affect her interests or the possible interests of her children.

Willis K.C. (*Hon. V. Russell* with him) for the wife. There is ample authority for extinguishing the interest of the husband in the wife's fund : *Wigney v. Wigney* (1) ; and the Court has a discretion to order reconveyance to the wife of her fund in spite of a trust for her next of kin : *Wynne v. Wynne*. (2) *Meredyth v. Meredyth* (3) is a precedent for its doing so in the present case.

F. L. C. Hodson for Ethel Mary Archer. The interest of possible next of kin in futuro should be preserved to them. The Court will not affect the interests of innocent persons. *Wynne v. Wynne* (2) is a doubtful authority for what is proposed. In that case the wife had power to dispose of the fund by will and had control of it. In *Meredyth v. Meredyth* (3), in which case an order was made similar to

(1) (1882) 7 P. D. 177.

(2) (1898) 73 L. T. 796.

(3) [1895] P. 92.

that asked for, it was nevertheless expressly laid down that the Court will not affect the interests of persons whose conduct has not been impugned. Moreover there was no person in existence whose interest could be prejudiced, as is the case with my client, and the husband had settled the property himself. In the present case it was settled by his father. *Walpole v. Walpole* (1) should be followed, which expressly distinguished *Wynne v. Wynne* (2), and preserved the interests of next of kin. *Morrissey v. Morrissey* (3) is distinguishable. In that case the next of kin consented.

1929

 WEBB
v.
WEBB.

H. D. Grazebrook for the trustees of the settlement. In the cases referred to in argument, *Walpole v. Walpole* (1) alone goes the whole way contended for on behalf of Mrs. Archer and the facts were entirely different. Mrs. Archer is a volunteer and gave no consideration for the settlement.

Barnard for the respondent.

Willis in reply. The jurisdiction is exercised under the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192, which gives the Court an unfettered discretion to apply the property for the benefit of the parties to the marriage.

BATESON J. I think the registrar is right in this case. It is a motion by the wife, who has obtained a decree for dissolution of marriage, to add to the order of the registrar on an application to vary a settlement words extinguishing the rights under the settlement of the next of kin of the wife.

Sect. 192 of the Judicature (Consolidation) Act, 1925, gives power, as has been pointed out by Mr. Willis, to vary the settlement—a perfectly wide power—but there are several cases which have dealt with variations of settlements, which have already been referred to by both sides, and it seems to me that I must be guided by these decisions.

The question arises upon a clause in this marriage settlement with regard to the wife's fund, which provides that if the husband shall survive the wife the income of the entire

(1) [1901] P. 196.

(2) (1898) 78 L. T. 796.

(3) [1905] P. 90.

1929

WEBB

v.

WEBB.

Bateson J.

wife's fund shall be paid to him for the period of two years from the death of the wife if he shall so long live and after that period of two years or the death of the husband, whichever shall first occur, that 2000*l.* part of the wife's fund shall be held in trust for the husband absolutely and the residue in trust for such person or persons as would have become entitled to it if the wife had died possessed thereof intestate and without having married, and such persons, if more than one, shall take as tenants in common; and then it goes on to provide for the case of the wife surviving the husband.

Now it is said that under that clause it is quite clear that the next of kin of the wife have an interest if the events fall out as they may do. I am not going to decide whether that is an accurate view or a proper construction of that clause to-day. That question may never arise; it has not arisen yet and it may never arise, and I am not going to prejudice by anything I say any contention upon the clause that may possibly be raised hereafter. I have only got to say whether I think the variation which the registrar had made in this case is a proper one under the circumstances. There is a possibility of the next of kin having an interest—whether it is probable or not I do not know—but there is certainly quite a possibility that she (it is a lady in this case) may hereafter have an interest in this fund, and if so, nothing ought to be done to prejudice her right.

The way variation of settlements has been dealt with in this kind of matter is pretty clear to my mind from the cases that have been referred to: *Wynne v. Wynne* (1); *Meredyth v. Meredyth* (2); *Morrissey v. Morrissey* (3); and *Walpole v. Walpole*. (4) Dealing with the first three cases, it seems to me that the principle laid down is that the Court will not accede to a motion of this kind unless the interests of living persons will not be prejudiced. In *Wynne v. Wynne* (1) the wife had an absolute power of appointment away from any next of kin, and, therefore, there was no hardship on the next of kin if the fund was reconveyed. In *Meredyth*

(1) 78 L. T. 796.

(3) [1905] P. 90.

(2) [1895] P. 92.

(4) [1901] P. 196.

v. *Meredyth* (1) the only persons who could possibly be prejudiced were unborn children of a marriage which had not even taken place, therefore there were no living persons to be prejudiced in that case. In *Morrissey v. Morrissey* (2), which was a similar case to this, the next of kin consented to the order and, therefore, it is no authority for anything. The only case that comes anywhere near to the present is *Walpole v. Walpole* (3), and there what the President, Sir Francis Jeune, appears to have done was to leave the matter where the registrar has left it in this case. In that case there were living interests which might be prejudiced and the order was made, as I understand it, in practically the same form as the report recommends in this case.

I cannot accede to this motion, and the registrar's report must be confirmed.

Costs of the motion to be paid by the wife and of the variation proceedings other than of the motion by the husband.

Solicitor for the petitioner : *G. R. Cran.*

Solicitors for Mrs. Archer : *Grover, Humphreys & Boyes.*

Solicitors for the trustees : *Hopwood & Sons.*

Solicitors for the respondent : *Herbert Reeves & Co.*

(1) [1895] P. 92.

(2) [1905] P. 90.

(3) [1901] P. 196.

R. M. M.

1929

WEBB

v.

WEBB.

Bateson J.

1929

Jan. 29.

In the Estate of MARTHA BIRCH.

Administration—Settled Land—Land settled previously to Death of Tenant for Life—Determination of Settlement on Death of Tenant for Life—General Grant of Administration to Remainderman under Settlement without Citation—Administration of Justice Act, 1928 (18 & 19 Geo. 5, c. 26), s. 9 (b).

On facts similar to those in the case of *In the Estate of James and Marion Christie Bordass* (ante, page 107) the Court made a similar grant but without citation, although the deceased had no known next of kin, the Treasury Solicitor not interfering.

MARTHA BIRCH died on March 27, 1928, intestate and a widow without known next of kin. Her husband, George Birch, who predeceased her, by his will, had appointed her and Cyril Henry Birch, his grandson, executors, and devised and bequeathed to her certain freehold property for her life, with remainder to his daughter, Louisa Mary Wright, widow. Martha Birch died without having executed any vesting instrument regarding the freehold property in question. Her only estate consisted of personal effects of trifling value. The Treasury Solicitor had been communicated with, but did not propose to interfere. Cyril Henry Birch moved for a grant of administration to the estate of the deceased to be made to Louisa Mary Wright.

F. L. C. Hodson (*T. Bucknill* with him) for the applicant, referred to the case of *In the Estate of J. and M. C. Bordass* (ante, page 107) and the Administration of Justice Act, 1928 (18 & 19 Geo. 5, c. 26), s. 9 (b). (1)

HILL J. made a general grant under the Administration of Justice Act, 1928, s. 9, without citation.

Solicitors: *Sharpe, Pritchard & Co., for Shoesmith & Harrison, Northampton.*

(1) The Administration of Justice Act, 1928, s. 9 (b): "If, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have

been entitled to the grant of administration, the Court may in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the Court thinks fit."

R. M. M.

JOHNSTONE v. JOHNSTONE.

C. A.

1929

Jan. 11.

Divorce — Practice — Costs — Wife's Petition for Divorce — Appearance by Husband under Protest—Denial of Jurisdiction—Issue directed—Liability of Husband to pay and give Security for Wife's Costs of Issue—Interlocutory Proceeding—"Other good cause" for not ordering Security—Matrimonial Causes Rules, 1924, r. 91—Inherent Jurisdiction of Court.

A husband cannot refuse to pay and give security for his wife's costs of divorce suit or issue as to domicile merely on the ground that he disputes the jurisdiction. A husband who appears under protest to a wife's petition and disputes the jurisdiction on the ground of his having a foreign domicile may be ordered to pay his wife's costs of suit up to the setting down of the issue and to give security for her costs attendant on the issue and down to the close of pleadings.

So held by Lord Hanworth M.R. and Lawrence L.J. on the ground that the Court had jurisdiction to make the order under r. 91 of the Matrimonial Causes Rules, 1924; by Greer L.J. on the ground that the Court had inherent jurisdiction derived from the practice of the old Ecclesiastical Courts.

Smith v. Smith [1923] P. 128 approved.

Decision of Hill J. affirmed.

APPEAL from a decision of Hill J.

The petition was presented by the wife, Stella Ethel Johnstone, against the husband, Clarence Nathaniel Johnstone, for dissolution of marriage.

The husband claimed that he was domiciled in the United States and entered an appearance under protest, with the result that an issue was directed to try the question of domicile. The issue, however, had been stayed pending interlocutory proceedings commenced by the wife for security for costs.

The wife lodged a bill for taxation up to the setting down of the issue, with the usual request at the end of it for security. The security was to enable the wife and a witness to come from America to England to give evidence at the hearing of the issue, and the estimated amount of the security required was about 400*l*.

On the appointment for the taxation of this bill on October 30, 1928, objection was taken on behalf of the husband (a) that the registrar had no jurisdiction to tax the bill if the husband's contention that he was not

C. A. domiciled in England was correct, and (b) that if he had jurisdiction taxation was not a matter of course, and that the 1929 case was not one in which security should be ordered. The JOHNSTONE registrar thereupon made the following indorsement on the v. bill: "Solicitors for both parties. Solicitor for respondent JOHNSTONE. asked me not to tax bill or give security in order that he might appeal to the judge as to jurisdiction. I feel bound by the cases of *Gran v. Gran* (1), *Graham v. Graham* (2) and *Smith v. Smith* (3) and said that I was ready to tax bill and order security but allowed an appeal before doing so."

The husband appealed to the judge in chambers. The appeal came on for hearing before Hill J. on November 26, 1928, who after hearing the contentions of the parties, dismissed it with costs. His attention had been drawn to *Smith v. Smith* (3), a decision of his own, which on the face of it was against the husband's contention; but in dismissing the appeal he stated that that case and other cases to which he had been referred were not to be taken as laying down a rule of law, but that it was the duty of the registrar before whom a bill came for taxation, to consider any affidavit evidence that might be put before him, and to decide whether or not he would tax the bill and order security.

In due course a fresh appointment was taken to tax the bill, and an affidavit by the husband dealing with the facts was then put before the registrar.

In the affidavit the husband stated that he was born in 1865 and was by birth and parentage an American citizen. He was married to the wife in New York in 1914 and lived in America with her until May, 1924, when he came to England, having never previously been out of the United States. He came to England to fulfil theatrical and music hall engagements. In July, 1924, his wife joined him in England, but owing to differences between them she returned to New York in October, 1924, where she had since resided in a flat provided by the husband. Except for a short visit to America in June, 1927, he had been fulfilling engagements in England and

(1) (1921) Times Newsp. Feb. 15,
Mar. 1, 19.

(2) [1923] P. 31.
(3) [1923] P. 128.

France since June, 1924. He had never applied for naturalization in England and had never renounced his American citizenship. He was registered in England as an American citizen, and was subject to all the restrictions applicable to aliens in this country. His permit expired in December, 1929. He had no intention of permanently remaining in England. Since October, 1926, he had allowed his wife 10*l.* per week. Before the petition was filed his wife's solicitors had been informed that the jurisdiction of the English Court would be contested. His wife could continue the divorce proceedings which a short time ago she had commenced against him in New York. The registrar having read the affidavit and having been informed of the comments of Hill J. in dismissing the previous appeal, made the following note on the summons: "I refuse to tax the bill or order security on the ground that the affidavit of the plaintiff handed in shows good cause within r. 91. (1)" Upon this the wife appealed to the judge in chambers, who held that the affidavit of the husband did not show good cause within r. 91, and ultimately allowed the appeal with costs.

The husband appealed. The appeal was heard on January 11, 1929.

W. O. Willis K.C. and *T. F. Davis* for the appellant. No order for taxation of the wife's costs ought to be made.

(1) Matrimonial Causes Rules, 1924, r. 91: "After the registrar's certificate that the pleadings are in order has been given, or at an earlier stage of a cause by order of the judge or of a registrar to be obtained on summons, a wife who is a petitioner or has filed an answer may file her bill or bills of costs for taxation as against her husband, and the registrar to whom such bills of costs are referred for taxation shall ascertain what is a sufficient sum of money to be paid into Court or what is a sufficient security to be given by the husband to cover

the costs of the wife of and incidental to the hearing of the cause, and may thereupon unless the husband shall prove to the satisfaction of the registrar that the wife has sufficient separate estate or show other good cause issue an order upon the husband to pay her costs up to the setting down of the cause and to pay into Court or secure the costs of the hearing within a time to be fixed by the registrar. The registrar may in his discretion order the costs up to setting down to be paid into Court."

C. A.
1929
JOHNSTONE
v.
JOHNSTONE.

C. A. Rule 91 of the Matrimonial Causes Rules, 1924, on which the
 1929 wife relies does not apply to subsidiary matters, such as an
 JOHNSTONE issue to determine domicile. It refers only to the ordinary
 v. costs of a suit between husband and wife, which are in the
 JOHNSTONE discretion of the registrar: *Williams v. Williams*. (1) The
 registrar was therefore right in refusing to tax the bill.
Smith v. Smith (2); *Graham v. Graham* (3); and *Gran v.*
Gran (4), upon which the registrar relied when the application
 was first made to him to tax, have no bearing on the present
 case. *Smith v. Smith* (2) and *Graham v. Graham* (3) were
 both cases of an Act on Petition. *Gran v. Gran* (4) did not
 decide the point raised in the present case.

Here the wife is seeking to set up a change of domicile
 in the husband.

If r. 91 applies, it is submitted that the husband has shown
 "good cause" in his affidavit why no order for security
 should not be made, for the wife has not made a *prima facie*
 case which would bring this case within the jurisdiction of
 this Court.

[LORD HANWORTH M.R. referred to *Bevor v. Bevor*. (5)]

The Court has a general discretion as to costs in all pro-
 ceedings in the Supreme Court: Supreme Court of Judicature
 (Consolidation) Act, 1925, s. 50.

H. D. Grazebrook for the respondent. The question in this
 case is one for the exercise by the registrar of his discretion
 under r. 91. The issue as to domicile is a stage in the matri-
 monial cause. Until that issue is disposed of the husband is
 not bound to file his answer.

[LORD HANWORTH M.R. It appears from r. 16 (B) that the
 husband is bound to take the initiative.]

The issue here is a stage in the "cause." "Cause" is defined
 by s. 225 of the Supreme Court of Judicature (Consolidation)
 Act, 1925, to include "any action, suit, or other original
 proceeding between a plaintiff and defendant, and any
 criminal proceeding by the Crown."

(1) (1928) 67 L. J. Notes of (3) [1923] P. 31.
 Cases, 13.

(4) (1921) Times Newsp. Feb. 15,
 Mar. 1, 19.

(5) (1809) 3 Phillim. 261, 262.

[GREER L.J. You are asking for security for the costs of the hearing of the issue. Rule 91 speaks of the hearing of the petition.] C. A. 1929

The issue is of and incidental to the cause. I should be content for the registrar to tax the costs up to the hearing of the petition, in which case, on the principle that the greater includes the less, the costs of the issue would be included.

JOHNSTONE
v.
JOHNSTONE.

[He was stopped.]

W. O. Willis K.C. in reply. So far as the main petition is concerned r. 91 does not apply, as no costs have as yet been incurred and no certificate has yet been made by the registrar that the pleadings are in order. The wife's application is therefore premature. The rule gives no power to secure the costs of an interlocutory proceeding, as, for example, the trial of an issue. What has here been set down is not what is contemplated by the rule as being set down. This is an issue in which the wife is not a petitioner but a defendant.

If the Court is of opinion that the security ought to be given it is submitted that the whole of the money ought to be paid into Court.

LORD HANWORTH M.R. This appeal fails. It raises a point of interest and importance with regard to the provisions with reference to a wife's costs in divorce proceedings.

The facts are these. The petitioner is Stella Ethel Johnstone, the wife, and the respondent Clarence Nathaniel Johnstone, the husband. In her petition the wife charges her husband with adultery. We are told that both the parties are nationals of the United States of America and were married in the States. After their marriage they lived over here for a short time, the husband being a music hall entertainer and engaged here in that capacity. The wife has returned to New York. The husband, being a foreigner, has obtained the leave of the Government to reside over here under licence, and his present licence will not expire until December 31 of the present year. The marriage took place in New York on June 25, 1914, the husband is alleged by the wife to have been unfaithful

C. A. 1929
 JOHNSTONE
 v.
 JOHNSTONE.
 Lord Hanworth
 M.R.

and the wife claims divorce. The husband has protested against the jurisdiction of this English Court and has entered an appearance under protest. This he is enabled to do by r. 16 (B) of the Matrimonial Causes Rules, 1924, which provides: "The appearance may be under protest or limited to any proceeding in the cause in respect of which the party shall have received notice to appear. Provided that (a) any appearance under protest shall state concisely the grounds of protest, and (b) the party appearing under protest shall forthwith proceed by summons to obtain directions as to the determination of the question or questions arising by reason of such limited appearance and in default of so proceeding shall be deemed to have entered an unconditional appearance. Directions to be given upon an appearance under protest may provide for the trial of a preliminary issue with or without stay of proceedings in the cause or for determination of the matters in question at the hearing of the cause." An appearance having been entered under that rule steps were taken by the husband to determine whether his objection was a valid one, and on March 27, 1928, pursuant to an order of the registrar dated February 7, 1928, an issue was directed to be tried which was in these terms: "Whereas Clarence Nathaniel Johnstone claims that he was not domiciled in England at the date of the institution of this suit and whereas the defendant alleges that he was so domiciled, and whereas it was ordered on the 7th day of February, 1928, that an issue be tried as to the domicile of the parties, therefore let the same be tried."

It is to be noted that in that issue the husband is made the plaintiff although the petition was presented by the wife. That was no doubt done in consequence of the terms of r. 16.

The husband has now become the moving spirit in the issue as to domicile, and the question as to the costs which have been raised in that issue is now the subject of this appeal.

On April 4 the issue was set down for trial.

The wife then took proceedings to have it determined what amount should be secured for costs to enable her to fight the issue. The matter came before the registrar on October 30,

1928, and on the defendant's bill of costs to be taxed up to the date of setting down the issue the registrar made the following indorsement: "Solicitors for both parties. Solicitor for respondent asked me not to tax bill or give security in order that he might appeal to the judge as to jurisdiction. I feel bound by the cases of *Gran v. Gran* (1), *Graham v. Graham* (2) and *Smith v. Smith* (3) and said that I was ready to tax bill and order security but allowed an appeal before doing so." The husband appealed to the judge, who, on November 26, dismissed the appeal with costs. Accordingly the matter again came before the registrar, and an affidavit by the husband which went to the merits of the case was placed before the registrar. [His Lordship read the material statements in the affidavit and continued.]

C. A.

1929

JOHNSTONE
v.
JOHNSTONE.
—
Lord Hanworth
M.R.

The registrar was impressed by the facts so stated in that affidavit and on December 5 he made this indorsement on the summons: "I refuse to tax bill or order security on ground that the affidavit of plaintiff handed in shows good cause within r. 91."

From that order there was an appeal to the judge, who on December 19 made this order: "On the appeal of the wife from the refusal of the registrar to proceed with taxation I do order that the appeal be allowed," and he directed the registrar to proceed with the taxation of the costs but gave leave to appeal.

It is from that order that the present appeal is brought.

The case may be put quite shortly thus: The husband says: "I have objected altogether to the jurisdiction and it may be found I am quite right, and if there is no jurisdiction I ought not to be hampered by being required to provide now for the costs my wife may incur in fighting this issue." There is weight in that argument. But, as I have already pointed out, the right to enter an appearance under protest connotes a duty to take proceedings to establish the validity of the plea under which the husband enters an appearance under protest.

(1) (1921) Times Newsp. Feb. 15,
Mar. 1, 19.

(2) [1923] P. 31.
(3) [1923] P. 128.

C. A. The husband is the moving party in this issue.

1929 It is however only an issue, but I do not think this makes any difference, for the word "cause" as defined in s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, now includes "any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding by the Crown."

JOHNSTONE

v.

JOHNSTONE.

Lord Hanworth
M.R.

But the husband also says that there is no power under r. 91 to require any taxation or security for costs against him.

I may point out that the costs are different in the Divorce Court from what they are in other Courts.

Going back to a case in 1809 Sir John Nicholl, Dean of Arches, in *Beevor v. Beevor* (1) says: "The general rule is, that the wife has a right to have her costs taxed at all times. The reason is because there are no other means of obtaining justice, since the marriage gives all the property to the husband. The rule however is not universal—the exception is where the reason fails—where the wife has separate property of her own; for then marriage does not give all the property to the husband."

The old rules of the Ecclesiastical Courts were preserved by s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and are now reproduced by s. 103 of the Supreme Court of Judicature (Consolidation) Act, 1925. The result is that the old rule as to the costs of the spouses is still applicable to costs in the Divorce Division, and the husband has to make provision for costs of the wife to enable her to contest the issue.

It may be said that here the wife is the petitioner, but in this issue the husband has now become the plaintiff. I doubt, however, whether that is of great importance.

We have to determine really what is the meaning of r. 91 of the Matrimonial Causes Rules, 1924, which deals with the wife's costs, and under which the wife is entitled to have the means of determining the issue raised, and I think that whether the husband is the plaintiff in the issue or the respondent to a petition the wife's costs have still to be

(1) 3 Phillim. 261, 262.

provided for by the husband that she may present her case to the Court. Rule 91 is a long rule, but when carefully looked at I think it justifies the order made by the judge.

There are several stages in a petition. There is first the petition then the answer, finally the pleadings are closed and then the matter set down for trial.

The costs of the wife may be separated into three stages : (1.) preliminary; (2.) down to the setting down for hearing; and (3.) trial.

There is here an additional stage, by virtue of the protest of the husband to the jurisdiction. That issue could have been raised by Act on Petition, but it was not so raised but by a separate issue.

Rule 91 of the Matrimonial Causes Rules, 1924, provides : “ After the registrar’s certificate that the pleadings are in order has been given ”—those words do not apply in this case—“ or at an earlier stage of a cause by order of the judge or of a registrar to be obtained on summons, a wife who is petitioner or has filed an answer may file her bill or bills of costs for taxation as against her husband.” It appears to me, therefore, on careful consideration that these words do make provision not only for costs incurred up to the setting down but for costs incurred in the future by estimation. Here an application is made for the costs of the wife to include the costs of the issue. It is said, however, that if the issue is decided in favour of the wife the pleadings will then have to be closed and the case set down for trial. The rule continues : “ and the registrar to whom such bills of costs are referred for taxation shall ascertain what is a sufficient sum of money to be paid into Court or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause, and may thereupon unless the husband shall prove to the satisfaction of the registrar that the wife has sufficient separate estate or show other good cause issue an order upon the husband to pay her costs up to the setting down of the cause and to pay into Court or secure the costs of the hearing within a time to be fixed by the registrar. The registrar may in his discretion order the costs

C. A.

1929

JOHNSTONE

v.

JOHNSTONE.

Lord Hanworth
M.R.

C. A. up to the setting down to be paid into Court." The last lines
1929 of the rule enable the costs up to the setting down to be paid
JOHNSTONE into Court, and therefore the order to be made is one for the
v. husband to pay into Court the costs of the wife already incurred
JOHNSTONE. and to secure the costs to the hearing. It is meant to secure
Lord Hanworth the costs of the wife in futurity.
M.R.

As the intention is that provision should be made for costs to be incurred I see no difficulty in taking the words of the rule as covering the costs of and incidental to interlocutory matters that may be incurred before the hearing of the cause, and the registrar with regard to this may make an estimate, when not already incurred. By reason of the power given to the registrar to order costs to be paid into Court it appears to me that we can safeguard the husband in case the wife is not, in the result, held to be entitled to costs. Therefore the words of the rule give power to the Court to estimate the sums required by the wife for costs up to the setting down of the cause and as to the costs of the hearing an estimate may be made.

It appears to me that Hill J. has rightly exercised the powers given under r. 91, and I agree with what he said in *Smith v. Smith* (1) where, referring to *Graham v. Graham* (2), he said: "I think this sufficiently shows that the Court has jurisdiction to order security notwithstanding that the husband is raising a question as to the jurisdiction of the Court to entertain the suit. I think that an Act on Petition is a stage in the original suit within Divorce Rule 158, and comes within the general rule about costs."

Therefore the order is right and direction should be given to the registrar to tax the costs in so far as they have already been incurred and to estimate the costs which will be incurred down to the close of the pleadings if the proceedings get so far, and that payment into Court should be made without prejudice to the determination by the judge at the trial whether the wife is entitled to have any part of the money paid in.

The appeal must be dismissed.

(1) [1923] P. 128, 129.

(2) [1923] P. 31.

LAWRENCE L.J. I agree. The first point taken by the husband is that he cannot be required to pay or secure his wife's costs until the question of jurisdiction has been decided. Hill J. following his own decision in *Smith v. Smith* (1) has held that the Court has power under r. 91 to make the order notwithstanding that the husband has objected to the jurisdiction of the Court. In my judgment the learned judge was right. The husband entered an appearance to his wife's petition under protest, and in accordance with r. 16 (B) of the Matrimonial Causes Rules, 1924, applied by summons in the cause to have the question of jurisdiction determined. The registrar thereupon directed an issue as to the domicile of the parties to be tried. The wife then applied for security for costs under r. 91.

C. A.

1929

JOHNSTONE

v.

JOHNSTONE.

It appears to me that, as the proceedings so initiated by the husband are proceedings which would not finally dispose of the cause originated by the wife's petition if the issue as to domicile were decided in the wife's favour, they are proceedings of an interlocutory nature in the cause and that the costs of the issue are costs of and incidental to the hearing of the cause within the meaning of r. 91.

It is said however that as the costs have not yet been incurred and as no certificate has yet been made by the registrar that the pleadings are in order, the wife's application for security is premature. In my opinion this contention cannot prevail in face of the express words of r. 91, under which the wife by order of the judge or registrar can obtain security at an earlier stage of the cause than the registrar's certificate that the pleadings are in order. As under that rule an order may be made, before the pleadings are certified to be in order, to cover all the costs of and incidental to the hearing of the cause I am of opinion that in the present case an order could now be made to cover all the wife's costs, or on the principle that the greater includes the less the order could be confined to the wife's costs of the issue which has been ordered to be tried or to the wife's costs down to the hearing of the cause.

(1) [1923] P. 128, 129.

C. A. 1929
JOHNSTONE
v.
JOHNSTONE.
Lawrence L.J.

I am further of opinion that on a wife's application at an earlier stage the judge or the registrar has power to order security notwithstanding that the proceedings which have induced the wife to make the application at that stage are proceedings initiated by the husband for the purpose of ascertaining whether the Court has jurisdiction to entertain the cause. This procedure seems to have been adopted in *Smith v. Smith* (1) and also in *Graham v. Graham* (2), and I think that there is ample jurisdiction under r. 91 to make such an order in the present case either covering the whole of the wife's costs or such portion as may be deemed at this stage to be proper to be covered, founded on her costs already incurred and an estimate of her costs to be incurred in the future.

The last point taken on behalf of the husband was that the registrar had exercised his discretion, and it not having been shown that he had exercised it on any wrong principle, the judge ought not to have overruled his decision. I agree that great weight ought always to be given to the discretion of the registrar, and that such discretion ought not to be interfered with unless the Court comes to the conclusion that it was wrongly exercised.

It was not suggested in this Court that the husband had proved that the wife had sufficient separate estate. The registrar, however, came to the conclusion that the husband by his affidavit had shown "other good cause" why no order should be made. I cannot take this view. The bulk of the affidavit deals with matters directly relating to the issue as to domicile which has been ordered to be tried on viva voce evidence, and I think that the wife was rightly advised not to file a contentious affidavit in answer to these matters.

There are only two other statements in the affidavit to which I need refer: The first of these is that the husband had warned the wife that if she took proceedings in England he would object to the jurisdiction of the Court, and the second is that the wife had commenced proceedings against her husband for divorce in America. Neither of these

(1) [1923] P. 128.

(2) [1923] P. 31.

statements in any way proves that the wife's petition is frivolous or vexatious, and in my opinion they form no ground upon which the registrar could properly hold that good cause had been shown why the order for security should not be made. In the result I think that the learned judge was right and that this appeal should be dismissed.

C. A.

1929

JOHNSTONE

v.

JOHNSTONE.

Lawrence L.J.

I agree with the Master of the Rolls that the sum to cover the wife's costs ought to be paid into Court.

GREER L.J. After much doubt I have come to the conclusion that this appeal must be dismissed.

I differ entirely however from the other members of the Court as to the construction to be placed upon r. 91.

In my judgment the rule on its true construction does not give power to order security for the wife's costs of an issue as to domicile. But I think that the Court has inherent jurisdiction to deal with the costs of an issue of this kind, such jurisdiction being derived from the practice of the old Ecclesiastical Courts. Consequently, in my opinion, there was jurisdiction in the registrar to make the order which he refused to make.

As to the contention that there was "good cause" shown within r. 91, assuming that that rule applied, and that the registrar had properly exercised his jurisdiction, I am of opinion that the registrar was unduly influenced by the affidavit put before him by the husband.

In my judgment no great harm will be done to the husband if the order is made, as the money will be paid into Court, and will remain there subject to the order of the Court.

Appeal dismissed.

Solicitors for husband : *Bulcraig & Davis.*

Solicitors for wife : *Richard Brooks & Son.*

W. I. C.

C. A.:

THE YORK.

1929

March 18, 19. Shipping—Collision—Damages—Repairs—Contractual Obligations preventing Trading—Detention.

On March 12, 1927, the respondents' steamship suffered damage by a collision with the appellants' steamship, for which the appellants admitted liability. The damage did not render the respondents' vessel unseaworthy, and she continued trading without effecting repairs.

While she was so trading her owners by a memorandum of agreement dated December 21, 1927, contracted to sell her. The agreement set forth that the vessel was "due London on 24th December, thence Hamburg and Antwerp, expected ready for delivery between, say, 10th January and 31st January, and to be delivered to buyer at Antwerp or a U. K. port at seller's option, but not later than 25th February, 1928, subject to buyer's approval afloat and to bottom examination in dry dock, as specified in Clauses 4 and 5 of this contract. . . . 4. The buyer shall commence the inspection of the steamer afloat within twenty-four hours of receiving notice of steamer's readiness for inspection, and if on superficial inspection the buyer is satisfied with the general condition of the steamer, seller shall at his own risk and expense open up the engines, boilers and tanks for the inspection of the steamer afloat by the buyer. . . . The buyer shall declare acceptance or refusal of the steamer in writing within twenty-four hours after completion of such inspection afloat. . . . 5. For examination of bottom and/or other underwater parts and/or tailend shaft, seller agrees to put the vessel into dry dock. . . ."

The steamship arrived at Antwerp on January 10, 1928, and her owners gave notice to the buyer of her readiness. On January 16 they proceeded to open up the vessel's engines, boilers and tanks for inspection, and while the vessel was in that condition and therefore unable to trade, they took the opportunity to effect the repair of the collision damage, which was of such a nature that it could be repaired while the ship was afloat. The repairs admittedly occupied four days, and were completed on January 24. Subsequently the vessel was put into dry dock for bottom examination.

On the reference to assess the damage caused by the collision the respondents claimed (inter alia) loss and expenses in respect of four days' detention while their ship was undergoing repairs. The district registrar, Cardiff, allowed the claim, and Bateson J., on December 21, 1928, confirmed his report. On appeal by the owners of the wrongdoing ship:—

Held, that inasmuch as the respondent shipowners had entered into contractual obligations which prevented them from trading with the vessel and earning profits during the time when the repair of the collision damage was being executed, they had not suffered any loss by the detention of their vessel in consequence of the collision, and were therefore not entitled to recover from the wrongdoer.

Decision of Bateson J. reversed.

APPEAL from a judgment of Bateson J. affirming the report of the district registrar, Cardiff, on a reference to assess collision damages.

C. A.

1929

THE
YORK.

The appellants (defendants) were the owners of the steamship *York*; the respondents (plaintiffs) were the owners of the steamship *Royal City*.

On March 12, 1927, a collision occurred between the *Royal City* and the *York*. On March 21 the owners of the *York* admitted liability, and consented to a reference to assess the damage. The injury to the *Royal City* was slight, and not of such a nature as to render her unseaworthy, and she therefore continued trading without effecting repairs. On December 21, while the *Royal City* was still trading, her owners entered into a contract to sell her to Greek purchasers. By the contract, the material clauses of which are fully set out in the headnote and judgments, the *Royal City* was said to be "expected ready for delivery between, say, 10th January and 31st January," and was "to be delivered to buyer at Antwerp or a U.K. port at seller's option, but not later than 25th February, 1928, subject to buyer's approval after inspection afloat and to bottom examination in dry dock."

On January 10, 1928, the *Royal City* arrived at Antwerp, and her owners, after giving notice of "readiness" to the purchaser, proceeded on January 16 to open up the engines, boilers and tanks for inspection by the purchaser in accordance with the contract of sale. On the same day the repair of the collision damage was commenced, it being of such a nature that it could be executed without putting the vessel into dry dock. The repairs admittedly occupied four days, and were completed on January 24. During the whole of that time and until January 28 the engines, etc., remained opened up, and the vessel was not in a condition in which she could have traded. In February she went into dry dock for bottom examination.

At the reference before the district registrar, Cardiff, the owners of the *Royal City* included in their claim for collision damages an item of 195*l.* 17*s.* 4*d.* for four days' detention

C. A. of the vessel during repairs at Antwerp, and that item of
 1929 claim was allowed by the district registrar. On December 21,
 THE 1928, Bateson J. dismissed the motion of the owners of the
 YORK. *York* in objection to the report of the district registrar, and
 confirmed the report. The owners of the *York* appealed.

Dunlop K.C. (*Brightman* with him) for the appellants. The collision damage did not prevent the *Royal City* from trading, and the only reason why her owners ceased to trade with her after January 14, 1928, was because by the terms of the contract of sale they were under obligation to prepare her for inspection. In fact they would not and in law could not have used the vessel for trading during the four days in question, and the case comes within the principle laid down by Lord Sumner in *The Strathfillan* v. *The Ikala*. (1) *Admiralty Commissioners* v. *The Chekiang* (2) and *Ruabon SS. Co.* v. *The London Assurance* (3) have no application to the facts of this case. The shipowner can only recover if he prove the actual use he would have made of his ship, and also that the collision damage has deprived him of that use.

[*The Kingsway* (4); *The Glenfinlas* (5); *The Argentino* (6); and *Admiralty Commissioners* v. *The Susquehanna* (7) were also referred to.]

Langton K.C. (*Cyril Miller* with him) for the respondents. The onus is on the appellants to show that the contract of sale rendered it impossible for the respondents to use their ship as a profit earning instrument during these four days. The mere fact that they used the time when the collision damage was being repaired also to make the preliminary and secondary inspections under the contract of sale does not operate to deprive the respondents of their right to damages for detention. That is the doctrine laid down in *Ruabon SS. Co.* v. *The London Assurance* (3) and followed in *The Acanthus* (8) and *Admiralty Commissioners* v. *The Chekiang*. (2)

Dunlop K.C. in reply was not called upon.

(1) [1929] A. C. 196, 205.

(2) [1926] A. C. 637.

(3) [1900] A. C. 6.

(4) [1918] P. 344.

(5) [1918] P. 363n.

(6) [1888] 13 P. D. 191.

(7) [1926] A. C. 655.

(8) [1902] P. 17.

SCRUTTON L.J. We need not trouble you, Mr. Dunlop. This is an appeal from the Admiralty judge, confirming a decision of the district registrar at Cardiff, assessing the damage occasioned by a collision. The only point in the case is whether the owners of the ship, if entitled to damages, can recover the loss of profits of the ship's trading when repairs had been done at a time when, even apart from the collision, the ship could not have traded at all, for the simple reason that she had her engines opened up, so that she could not proceed. Stated in that way it rather looks as if the case is unarguable. Mr. Langton has argued it, however, and we must deal with it.

C. A.

1929

THE
YORK.

The facts are these. A large steamship, the *Royal City*, of about 5000 tons gross, met with a very slight collision with the French steamship *York*, which resulted in a visible but not very serious dent on her bow—a dent which any one could see, but which did not detract from her seaworthiness. Consequently after the collision the *Royal City* proceeded for some two voyages without repairing her damages. Having obtained judgment against the *York*, the owners of the *Royal City* might at once have proceeded to recover the damage without repairing it, and there is no doubt that in that case they would have recovered the damage, because repairs are only a method of estimating the amount of the damage; and there is no doubt in that case they would have recovered the estimated damages for their loss of trading profits during the four days which it is agreed is the proper time for repairing the collision damage. They did not take that course. At the end of December, 1927, the owners of the *Royal City* contracted to sell her to a Greek gentleman, and the contract of sale, dated December 21, 1927, stated that the *Royal City* was “expected ready for delivery between, say, 10th January and 31st January,” which, on the decisions, is a warranty that the facts at that time were such that she probably would be ready to deliver to the purchaser between those two dates. There was also what is in the nature of a cancelling clause—“and to be delivered . . . not later than 25th February, 1928,” which does not interfere in any way

C. A. with the warranty contained in the "expected ready for
1929 delivery between 10th January and 31st January." The
contract stated that the *Royal City* was due in London
on December 24, and was thence going to Hamburg and
Antwerp, and, therefore, it was known she would ultimately
come to Antwerp, and the contract was for her "to be
delivered to buyer at Antwerp or a U. K. port at
seller's option."

THE
YORK.
Scrutton L.J.

I think it is quite clear on the facts that the seller intended to deliver her at Antwerp. She reached Antwerp on January 10 with a cargo on board, which she had to deliver. I ought to have said, further, that the contract provided that the contract was "subject to buyer's approval after inspection afloat"; that is to say, the sale and purchase were subject to the buyer's approval after seeing her afloat; and the contract went on to provide: "The buyer shall commence the inspection of the steamer afloat within twenty-four hours of receiving notice of steamer's readiness for inspection, and if on superficial inspection the buyer is satisfied with the general condition of the steamer, seller shall at his own risk and expense open up the engines, boilers and tanks for the inspection of the steamer afloat by the buyer; and if the steamer is acceptable to the buyer he is to pay for the expense of closing up such engines, boilers, tanks and machinery. The buyer shall declare acceptance or refusal of the steamer in writing within twenty-four hours after completion of such inspection afloat."

As I have said, the *Royal City* arrived at Antwerp, with a cargo on board, on January 10, and notice was apparently given of the steamer's readiness for inspection while the cargo was being discharged. The inspection took place, and the buyer was satisfied with the superficial inspection of the steamer, and so the next step had to proceed. The next step was that having got the cargo out, and being ready for the work provided for by the contract, the seller had to open up the engines, boilers and tanks for inspection. That he began to do on January 16, the work was finished on January 28, and the buyer was satisfied with what he saw on

that inspection. Consequently, there came the last stage, which was that the steamer having been stemmed for dry dock, she went into dry dock on February 2, and the inspection of the bottom, and other under water parts, and the tail end shaft, took place in February. Meanwhile, and while the engines, boilers and tanks were opened up, and the ship, therefore, could not possibly proceed to sea or trade, opportunity was taken to put right the collision damage done by the *York*, which could have been done without going into dry dock, and which involved dealing with one plate and possibly fairing some others—work which it is agreed would take four days. That four days' work was done between January 16 and January 28; that is to say, while the ship was in such a position, owing to what was being done under the contract of sale, that she could not have traded if she had wanted to.

Then comes the question, what damage ought the registrar at Cardiff to have assessed as the damage done by the *York*? There is no dispute that the owners of the *Royal City* were entitled to recover the cost of repairs. There is no dispute as to that; but they go on and say: "These repairs took four days, and, therefore, we are entitled to four days' loss of trading profit, because you, by doing this damage, have stopped us from trading the vessel for four days." The answer made to that is this: "We have not done anything of the sort. You could not have traded at this period if there had been no collision damage, because you were engaged in fulfilling your contract of sale by putting the ship into such a condition that she could not have traded if she had wanted to; and what has happened is exactly what would have happened if there had been no collision and no damage at all. You would still have opened up this ship for inspection of boilers, engines and tanks, and you would not have been able to trade. The fact that you were not able to trade has nothing to do with the collision. It was because you had sold the ship, and the buyer required a certain amount of inspection which would prevent the ship from trading."

C. A.

1929

THE
YORK.

Scrutton L.J.

C. A.

1929

THE
YORK.

Scrutton L.J.

It seems to me that, put in that way, the case comes exactly within Lord Sumner's one sentence in *The Ikala*. (1) The actual question in *The Ikala* (1) was whether a ship claiming damage by collision could recover the high profits that would have been made in trading in a way in which, by agreement, she was prevented from doing; and the Court of Appeal, and the House of Lords by a small majority, held that she could not. In the course of that case Lord Sumner, who gave the leading majority judgment—a judgment concurred in by Lord Buckmaster—said: "It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work, which she would otherwise have done during the time, went undone to his measurable loss." In this case there was no work which she would otherwise have done during the time, for the reason that by her contract of sale she had incapacitated herself from doing any work at the time; and that being so, it appears to me that the shipowner fails to prove that the wrong of laying the ship idle was the result of the collision. His ship was idle because of the contract of sale and purchase, and the work which had to be done under it. The work which had to be done under the contract of sale prevented the shipowner from doing any other work at the time when the collision damage was being repaired.

A very similar sort of point seems to me to have arisen in a case which came before the London registrar, *The Glenfinlas* (2), which was approved by Hill J. in *The Kingsway* (3), approved expressly by Lord Sterndale in that case in the Court of Appeal, and in my view approved by myself in principle, without stating the name of the case, in the first passage of my judgment. In *The Glenfinlas* (2) there was a collision; permanent repairs were postponed, but before the permanent repairs were done the ship struck a mine and sank, whereupon the owners of the ship claimed, first of all, for the cost of doing the permanent repairs—because the ship when sunk was of less value to them, for she

(1) [1929] A. C. 196, 205.

(2) [1918] P. 363*n*.

(3) [1918] P. 344, 352, 358, 362.

was in such a condition that she required permanent repairs—and they also claimed for the loss of trading profits during the time when they would have done the permanent repairs but for the fact that the ship was sunk. The learned registrar gave them the cost of permanent repairs, rightly and obviously, I should think, because that damage had been done to the ship, and at the time the ship was sunk she was of less value because of the damage done by the previous collision. He said, however: “As regards the damages for detention, however, they were in his opinion clearly inadmissible. Being purely consequential damages they were on a different footing from the estimated cost of repairs for an actual injury to the plaintiffs’ chattel. The principle to be applied was *restitutio in integrum*, and to give damages for a loss of time which had not occurred would be to act contrary to this maxim. The claim, therefore, for loss of the use of the vessel could not be allowed.” Hill J., in *The Kingsway* (1), said: “If it is certain that repairs cannot at any time be effected, as, for example, if the ship is at the time of the reference already lost unrepaired, nothing, in my opinion, can be allowed for detention. Such was the case of *The Glenfinlas* (2), recently before Mr. Registrar Roscoe, to which I was referred. If there neither has been, nor can be, detention during repairs, the owner can suffer no loss by reason of detention.” Lord Sterndale (Pickford L.J. as he then was) said: “He” (that is, Hill J.) “took the view, and I should agree if it were necessary to decide it, that if at the time of a reference the ship had been in fact lost, as in the case of *The Glenfinlas* (2), and therefore the repairs never could be done, and there never could be a detention causing loss of profitable employment to the shipowner at all, then these damages could not be recovered. When I say lost, I mean lost by some circumstances outside the collision.”

I put during the argument other instances where apparently the same result would follow. In the present remarkable winter all the ports of the Baltic have been permanently blocked by ice. Suppose that a vessel caught in the Baltic,

C. A.

1929

THE
YORK.

Scrutton L.J.

(1) [1918] P. 344, 352, 358, 362.

(2) [1918] P. 363*n*.

C. A.

1929

THE
YORK.

Scrutton L.J.

and detained by ice so that she could not trade at all, takes the opportunity of doing repairs. She may recover the cost of repairs, but in my view she is not entitled to say: "I have lost so many days trading profit," because the pre-existing condition, which has nothing whatever to do with the collision, is that however much she wanted to trade, she could not, because she was held up by ice. Another case which occurred to me was the case of an embargo preventing any ship from moving or trading, and the shipowner, taking advantage of his ship being held up by the embargo, deciding to do repairs due to a previous collision. Again I do not think it would be possible for him to say: "I claim from you the loss of profit on trading," because it was quite impossible, owing to circumstances not connected with the collision at all—namely, the embargo—that he should trade, and consequently he never lost any profits of trading because of the collision. If I understood Mr. Langton's argument, it was that it was so uncertain when the repairs could be done that you could not treat the various detentions under the contract of sale and the collision as having necessarily anything to do with each other. It appears to me on the facts that the owners of the *Royal City* intended throughout the time of the contract of sale to take the ship to Antwerp, and there go through the processes which were necessary to fulfil the contract, which I have no doubt did include making the collision repairs, because a purchaser, particularly a Greek purchaser, would certainly use the existence of a large dent in the bow unrepaired to reduce the price, unless the seller undertook to repair it in order that he, the purchaser, might be satisfied.

There is one other word I desire to say. The judgment of Bateson J. proceeds in a large measure on a view of the contract that the word "delivery" when used does not mean delivery to the purchaser under the contract of sale, but means tendered to the purchaser in order that he may make his superficial inspection. In my view the number of times that the word "delivery" is used in the contract precludes that view of the contract, and the view therefore which

Bateson J. took, in my opinion, is not well founded,¹ because I think his construction of the contract is wrong.

C. A.

1929

The only other point I desire to make is that the learned registrar, whose report is before us, somehow managed to find that the ship, "upon the evidence before me, but for the collision, could and would have earned a profit, i.e. in those four days." With great respect to the registrar, I am quite unable to conceive where he could find any evidence to enable him to make that finding. The facts which I have stated seem to me to show clearly that the vessel could not have earned a profit, because of her proceedings under the contract of sale, and that the collision had nothing to do with her failure to earn profit during those four days.

THE
YORK.

Scrutton L.J.

In those circumstances the report must be varied by striking out the group of items which are contained under the head of loss of profit, otherwise the report is confirmed. The appellants must have the costs of the appeal.

GREER L.J. I agree. It is unnecessary for me to say anything with regard to the facts of the case, which have been stated in my Lord's judgment, but I want to say a few words about the principles that have to be applied in estimating damages.

The root principle in the law as to the measure of damages is this: damages are intended to be a compensation for loss caused by the wrongful act of the defendant, and the fundamental rule is that those damages are such a sum of money as will put the plaintiff, so far as money can, in the same position as that in which he would have been if there had been no breach of his right. That rule may be subject to some exceptions, because there have been cases in which it has been decided that there is an absolute rule of law entitling a man to a particular measure of damages, whether in the events that have happened he has suffered that damage or not. There used to be one exception in the law of landlord and tenant, where a lessor could recover against his lessee damages for failure to repair at the end of the lease, although the repairs would have been absolutely useless to the landlord

C. A.

1929

THE
YORK.

Greer L.J.

because of the building having to come down, it being just as easy to take it down without the repairs as to take it down after the repairs had been done. However, that exception has been done away with. It has sometimes been thought that there was another exception with regard to damages for breach of contract for the sale of goods, where the difference as between market price and contract price was sometimes thought to be an absolute rule as to the measure of damage, without any inquiry as to whether that difference was actually lost by the plaintiff upon the facts as they happened in relation to the claim. Some doubt has, however, been cast by the case of *Re Hall (R. & H.), Ltd., and W. H. Pim (Junior) & Co.'s Arbitration* (1) in the House of Lords, upon the rule so stated. Be that as it may, I think it is quite clear, upon the authority of the three cases to which my Lord has referred, that that rule has no application to the claim in this case. It seems to me clear to demonstration, when the facts are carefully considered, that if there had been no tort committed by the defendant, still the plaintiff would have lost the use of his vessel during the four days in question; and, that being so, he has not suffered any damage by reason of the fact that he was prevented from profitably using his vessel during the four days. He would have been in exactly the same position if there never had been a collision and there never had been a dent in the plates of the ship. For these reasons I agree with my Lord that these damages cannot be recovered. The three cases to which my Lord has referred appear to me to be ample authority, if authority were needed, for the decision we are giving. I should just like to quote a passage from the judgment of Scrutton L.J. in *The Kingsway* (2), where the principle to which I have referred is stated. Scrutton L.J. said this: "The first thing clear is that when damages which would be otherwise prospective come to be assessed, facts which have actually happened may be taken into account, and when damages are being assessed for a tort which would include some disability of the person or thing injured it may be taken

(1) (1928) 139 L. T. 50.

(2) [1918] P. 362.

into account that before the damages come to be assessed the person or thing injured has ceased to exist, owing to circumstances not connected with the tort." The ceasing to exist is only one fact whereby it may become clear that the damages have not been suffered. The position as regards the contract of sale is certainly a fact which shows that the damages sought to be recovered have not in fact been incurred, and, therefore, cannot be recovered.

I agree that the order should be made as my Lord has said.

The Court ordered the respondents to pay the costs of the appeal and the costs of the Court below, and inasmuch as the appellants had tendered 4s. less than the amount recovered, ordered each party to pay its own costs of the reference before the district registrar.

Solicitors for the appellants: *William A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

Solicitors for the respondents: *Ingledeu, Sons & Brown, for Ingledeu & Sons, Cardiff.*

A. W. G.

C. A.

1929

THE
YORK.

Greer L.J.

C. A.

THE YOUNG SID.

1929

March 22.

Shipping—Collision—Practice—Both Vessels to blame—Appeal—Variation of Proportions of Blame—Costs—Rules of Supreme Court, 1883, Order LXV., r. 1.

On appeal from a judgment in a collision action in which the judge of the county court had found both vessels to blame in the proportions of two-thirds and one-third, the Divisional Court reversed the judgment to the extent of holding the vessels to blame in equal degrees, and the appellants were given the costs of the appeal. The respondents in the Divisional Court appealed on the question of costs:—

Held, that by Order LXV., r. 1, of the Rules of the Supreme Court, 1883, the question of costs is left in the unfettered discretion of the Court or judge, and unless the judge can be shown to have taken into consideration matters which are immaterial to the issue his decision is unappealable.

Decision of the Divisional Court (Lord Merrivale P. and Hill J.), ante, p. 109, affirmed.

APPEAL in an action of damage by collision from a decision of the Divisional Court on a question of costs.

The appellants (defendants) were the owners of the steam drifter *Young Sid*; the respondents (plaintiffs) were the owners of the steam drifter *Ocean Swell*.

A collision took place in Lowestoft Harbour on November 10, 1927, between *The Ocean Swell* and *The Young Sid*. The county court judge sitting at Lowestoft, who was assisted by nautical assessors, held both vessels to blame, the owners of *The Ocean Swell* to bear two-thirds of the damages and the owners of *The Young Sid* one-third, each party to pay its own costs. The owners of *The Ocean Swell* appealed. By their notice of appeal they alleged that *The Young Sid* was alone to blame, and on the hearing of the appeal they raised this contention; but alternatively they argued that if not solely to blame the preponderance of fault rested with *The Young Sid*.

The Divisional Court allowed the appeal, holding that both vessels were to blame, but in equal degrees. The question of costs was then argued, and on November 22, 1928, the Court delivered a considered judgment, awarding to the appellants (plaintiffs) the costs of the appeal.

The defendants, the owners of *The Young Sid*, appealed on the question of costs.

C. A.

1929

THE
YOUNG
SID.

Dunlop K.C. and *H. L. Holman* for the appellants. It has been laid down as a settled practice in the Court of Appeal and House of Lords that where an appellant contends that his ship is free from blame, and both ships are held in fault, so that the appellant only succeeds in part, each party shall bear its own costs. The Divisional Court says that although that may be the practice in the House of Lords it is not the practice of the Admiralty Division on appeals from the county court.

[SCRUTTON L.J. Does Order LXV., r. 1 (1), apply to this case ?]

Yes.

[Then you propose to make rules which fetter the discretion of the judge.]

The House of Lords and the Court of Appeal have laid down a practice which ought to guide without binding the discretion of the Court: see per Lord Phillimore in *The Canton*. (2) It is not an absolute rule, but it is a practice to be followed in the absence of exceptional circumstances.

Langton K.C. and *Naisby* for the respondents. Order LXV., r. 1 (1), leaves the question of costs in the absolute discretion of the Court, and it is obvious that the judges of the Divisional Court intended to exercise their discretion. In *The Canton* (2) Lord Phillimore is simply saying: "I have found the ancient rule and I recommend that your Lordships should not depart from it." It is merely an exercise of discretion by the House of Lords. In *Donald Campbell & Co., Ltd. v. Pollak* (3) the House of Lords were emphatic in declaring

(1) Order LXV., r. 1: "Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court, . . . shall be in the discretion of the Court or Judge; . . . Provided also that, where any action, cause,

matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge . . . or the Court, shall, for good cause, otherwise order."

(2) (1928) 31 Ll. L. Rep. 289, 293.

(3) [1927] A. C. 732.

C. A. that the discretion of the judge was unfettered and
1929 ¹ unappealable.

THE
YOUNG
SID.

Dunlop K.C. in reply. My submission is that the Divisional Court did not exercise its discretion judicially under the rule, but based its decision upon the existence of an alleged practice which does not exist and is in fact contrary to the practice of the Court of Appeal and the House of Lords.

SCRUTTON L.J. I hope that the judgment which we are about to give will not disappoint the crowds of Admiralty practitioners who have been represented to us as waiting for guidance. The point arises in this way. There was a collision in Lowestoft Harbour between two small steam drifters, *The Young Sid*, represented by Mr. Dunlop, and *The Ocean Swell*, represented by Mr. Langton. The learned county court judge, sitting with assessors, found that both vessels were to blame, *The Ocean Swell* in the proportion of two-thirds, and *The Young Sid* in the proportion of one-third. The owners of *The Ocean Swell* appealed against the county court judge's order, and they asked that the Court should determine that *The Young Sid* was alone to blame for the collision. They failed in that appeal, but they succeeded in getting the proportion in which the two drifters were in fault altered from two-thirds and one-third to both equally to blame.

The question of costs then arose. Apparently the contention was raised by those representing *The Young Sid* that there was a rule of practice, binding upon the judge of the Admiralty Court, by which once the vessels were found both to blame neither got any costs. The Divisional Court adjourned the matter for consideration. The President, after considering the matter, gave judgment, citing a passage from Lord Phillimore's judgment in *The Canton* (1), where both vessels were held to blame, stating that the ancient rule of the Court was that where both vessels were held to blame each party should bear his own costs in the Court of first instance, and concluding: "I would recommend your Lordships not to interfere with this settled rule of practice, and to hold that there should be no costs either in the Admiralty Division

(1) 31 Ll. L. Rep. 289, 293.

or in the Court of Appeal, and I think that this should also be the rule in your Lordships' House when the appellant seeks for a total reversal and the result in your Lordships' opinion is that both vessels are to blame." The President seems to have taken the view that the "settled rule of practice" as stated by Lord Phillimore did not agree with "the practice generally followed in this Division," which is the language he uses, and in his view "the practice generally followed in this Division" was that where the party appealing had succeeded on the appeal, the costs should follow the event of the appeal, and the successful appellant, although successful only in part, should have the costs of the appeal; and he mentions the case of *The Ceto* (1) in the House of Lords, which fitted in, in his view, with the practice as he understood it, and the earlier case of *The Fyenoord*. (2) The Divisional Court proposed, therefore, to give the appellants their costs of the appeal. The exact language is: "That being the case, although it is true, as Mr. Holman pointed out, that only a comparatively small amount is involved, the appellants had substantial ground of appeal, and they have succeeded, and it seems to me that so far as the appeal is concerned they ought to have their costs of the appeal." The owners of *The Young Sid* thereupon applied for leave to appeal, and Mr. Holman, appearing for them, stated: "My point will be that costs in a case of this sort are a matter of principle, and that the principle has been laid down in *The Canton* and *Rhesus*, and that it is not now open to the Court to exercise a discretion on the question of costs in an appeal where a judgment has been varied so that both vessels are held equally to blame. My point will be that in such a case as *The Canton* and *Rhesus* the Court always lays it down that there shall be no costs." On hearing that this question or principle was supposed to be involved leave to appeal was given in these terms: "Leave to appeal from the order of November 22, 1928, whereby the defendants were condemned in the costs of the appeal herein, but ordered that such appeal be limited to a matter of principle and not of discretion."

(1) (1889) 14 App. Cas. 670.

(2) (1858) Swa. 374.

C. A.

1929

THE
YOUNG
SID.

Scrutton L.J.

In my view the idea that any Court, under the Judicature Act, is limited by rules in the matter of costs is erroneous. There are rules which have the force of a statute, rules under the Judicature Act, of which Order LXV., r. 1, is as follows: "The costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or judge"; and the suggestion that because in previous cases of a particular character the Court has exercised its discretion in one and the same way, therefore a later judge, having the same set of facts before him, must exercise his discretion in the same way, appears to me to be quite erroneous. There is no doubt that until about the year 1927 the Courts below the House of Lords were laying down certain rules by which the judge, in his discretion, should be guided. For instance, a marked case of that will be found in the judgment in *Ritter v. Godfrey* (1), where all the members of the Court of Appeal, particularly Atkin L.J., attempted to codify the matters which would influence a judge in refusing a successful plaintiff his costs. Very elaborate judgments were given by the Court of Appeal in that particular case, formulating the sort of rules by which a judge should be guided. In *Donald Campbell & Co., Ltd. v. Pollak* (2), decided in 1927, however, the House of Lords pointed out, in most emphatic terms, that there was a statute which gave the judge trying the case discretion as to what he should do with the costs, and that in those circumstances if he exercised his discretion—unless he dealt with absolutely immaterial matters, such as the state of politics, or the weather, or the colour of the plaintiff's hair—his judgment as to costs was unappealable; and that he was not to be fettered by any previous rules of practice, or by the course of practice of other judges sitting in the same tribunal. The House of Lords said that *Ritter v. Godfrey* (1) was wrong, and that the Court of Appeal had no business to lay down rules, or to formulate rules for the guidance of the judge, as to whether or not a successful plaintiff should have his costs. In the particular case they set aside the judgment of the Court of Appeal, altering the decision of Branson J. as to

(1) [1920] 2 K. B. 47.

(2) [1927] A. C. 732.

costs in the case, in which the Court of Appeal thought he had considered matters which he ought not to have considered—namely, matters which he knew, because he had tried another case relating to the same parties. The House of Lords said that that was wrong; that there was no appeal from the discretion of the judge who tried the case, as to costs, provided that the learned judge did not deal with matters which had absolutely no connection whatever with the case.

C. A.

1929

 THE
YOUNG
SID.

Scrutton L.J.

That general statement of the House of Lords seems to me only to be repeating what had been said with regard to the alleged rule of the Court of Admiralty by the Court of Appeal in *The Friedeberg*. (1) Mr. Dunlop says, with some contempt, that that is an old case; but it was a case decided in 1885, at a very relevant time, shortly after the Judicature Act came into operation, as to the effect of the statutory provision in the Judicature Act. At that time, apparently, the impression of Admiralty practitioners was that there was a settled rule of practice that when a reference took place in the Admiralty Division, if the registrar struck off one-fourth of the claim each party paid his own costs; if he struck off more than one-third the claimant paid the other party's costs; and that that was the settled rule of practice in the Admiralty Court. Coming before the Court of Appeal, to ascertain whether that rule of practice could stand, Lord Esher said this: "The Court of Admiralty always had a discretion in regard to costs; even if it had not, it would have been given by the Judicature Acts; but, in fact, Order LXV., r. 1, has affirmed the already existing discretion. When a Court has such a discretion it is intended that it should exercise it in each individual case. The moment, therefore, that a hard and fast rule is laid down as to costs, the judge's discretion is fettered. With all deference to that eminent judge, Dr. Lushington, the moment he laid down as a general rule, that if, on a reference, the plaintiff did not obtain a certain proportion of his claim, he was to be deprived of, or to pay, costs, he did what was wrong. For he tried to fetter

(1) (1885) 10 P. D. 112, 113.

C. A. his own discretion and that of his successors, which he
 1929 had no legal power to do. As to the rule, if it could be
 THE made, I doubt if it would be a good rule, and in many
 YOUNG cases it must work injustice. But since the judge of the
 SID. Admiralty Court must exercise his discretion in every
 Scrutton L.J. case, it is wrong to say that there is any rule by which
 he can be bound."

As to the supposed rule laid down by Lord Phillimore in *The Canton* (1), I desire to say, first of all, that I do not think he was laying down more than a suggestion which would be considered by any subsequent Court which had a similar set of facts before it. Secondly, if he was intending to lay down such a rule, he was going contrary to the decision of the House of Lords in *Donald Campbell & Co., Ltd. v. Pollak* (2); and I notice that although he sat on the appeal as to the merits in *Donald Campbell & Co., Ltd. v. Pollak*, he was not one of the seven Law Lords who sat to consider the preliminary question of jurisdiction, and the question of appeal. It may be, therefore, that he had not in his mind, so clearly as he would otherwise have had, what the House of Lords in fact decided in the case of *Donald Campbell & Co., Ltd. v. Pollak* as to the unfettered discretion of the judge of first instance.

If, as Mr. Holman said, this case is intended to decide whether there is a rule binding the discretion of the judge, that where both vessels are held equally to blame there shall be no costs, whatever success the appellant has on the appeal, then such a contention is, in my view, erroneous. Similarly, with great respect to the President, if I thought he was saying: "There is a settled rule of this Court which we are bound to act upon in the Divisional Court," I think, equally, he was wrong. As I read the President's judgment, however, I think he is not doing more than saying there is not a settled rule. In my view, what the President has done, particularly having regard to the last sentence of his judgment, is this. He has said: "In our discretion we think that this is a case in which the appellant, who has partly succeeded in his appeal, should

(1) 31 Ll. L. Rep. 289.

(2) [1927] A. C. 732.

have the costs of that partial success, because he had to come here to get it." Speaking of my own experience in this Court in common law cases (and, I am sorry to say, I have had thirteen years' experience here) the question is constantly arising. An appellant brings a very wide-sweeping appeal, and succeeds in part. It is said on the one side: "See how much the appellant has failed in." It is said on the other side: "Ah, but he succeeded in this, and he had to come here to get it"; and the Court acts on no settled rule of practice, but considers the circumstances of each case, and considers whether the appropriate order would be, in view of the fact that the appellant has failed in a large part of the appeal, to make a special order as to costs, or whether he has succeeded in a sufficiently substantial amount to justify giving him the costs of appeal.

I should like to say, as has been pointed out to me by my brother Sankey—as no doubt he will himself point out—that circumstances have very much altered since the Maritime Conventions Act, 1911, enabled the Court to depart from the old "rustic" rule of equal blame, and to give proportions of two-thirds and one-third, one-quarter and three-quarters. I do not know how far at present, in the matter of proportions, the Admiralty Court has gone. The power of varying proportions obviously raises such a lot of different circumstances that an unfettered discretion is a thing which should be left to the judge of the Admiralty Division, and which, in my view, is left to him by Order LXV., r. 1, which has the force of a statute.

The result is that we decide that the question of the previous practice of the Court is immaterial. If in this case the President had purported to say: "I use no discretion and act on the previous practice of the Court," we should have sent the case back to him in order that he might use his unfettered discretion; but as, in my view, the Divisional Court has used its discretion, it follows that there is no ground for suggesting that they are bound by a previous rule of practice to decide otherwise, and the appeal, therefore, must be dismissed, with costs.

C. A.

1929

 THE
YOUNG
SID.

Scrutton L.J.

C. A.
1929

THE
YOUNG
SID.

GREER L.J. I agree. The present respondent, who was appellant in the Divisional Court, was complaining of the finding of the learned county court judge, that put upon him two-thirds of the damages caused by a collision. He asked the Divisional Court to say that he was not responsible for any of the damage, and said he ought to have had judgment with costs. He also asked the Court, and it was open to the Court, to say that the proportion of the damages put upon him was not the right proportion, and that it ought to be something less. The Divisional Court held that it ought to be something less, and that it ought to be half and half. It follows that the appeal from the county court was partially successful, and a remedy was obtained by the appellant that he could not have got without bringing the matter before the Divisional Court. For myself I should have thought, although there is no rule binding the discretion of the Court, that that was *prima facie* a reason why the present respondent, the appellant below, should have the general costs of the appeal. However, it was argued by those who appear for the present appellant that there was a practice of the Court that in those circumstances there should be no costs on either side, and that the practice of the Court was so strong as to amount to a rule of law that in those circumstances the Court must order each party to bear his own costs. Leave to appeal was asked for by Mr. Holman in these terms: "I do not wish to appeal as to the exercise of discretion, but my point will be that costs in a case of this sort are a matter of principle, and that the principle has been laid down in *The Canton* and *Rhesus*, and that it is not now open to the Court to exercise a discretion on the question of costs in an appeal where a judgment has been varied so that both vessels are held equally to blame." He was there asking liberty to raise, as a point of law, the question whether there was any discretion still left open to the Court, and it was only upon the point of law that he obtained leave to appeal, and that is the only question of law with which we have to deal.

The rule dealing with the costs in all proceedings in the Supreme Court, which includes proceedings by way of appeal

to the Probate, Divorce and Admiralty Division, as well as any other proceedings in the Supreme Court, including, of course, proceedings before the Court of Appeal, is Order LXV., r. 1. That rule says this: "Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund"; and then it goes on to deal with what is to happen when there is a trial by jury. "Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order." There is a clear distinction drawn between the discretion which is allowed to a judge who tries a case without a jury, and what his powers are when the case is tried with a jury. When the case is tried with a jury the costs follow the event, unless the learned judge can find good cause for otherwise ordering. The question as to what is good cause is quite clearly a matter of law, and there have been a number of decisions on the question what is or is not good cause; but no such question can arise where the case is tried without a jury. There you have only to look to the first part of the rule to see what the law is upon the subject; and the law is that the judge is to exercise his discretion.

Naturally, but perhaps unfortunately, there grew up a habit on the part of judges who were trying cases alone, of stating, when they were dealing with costs, what were the reasons that influenced their judgment in giving the costs to the plaintiff or the defendant, as the case might be; and gradually those decisions appear to have become considered to be decisions on questions of law, whereas they were not decisions on questions of law at all. It thus came about that there seemed to be nearly as many decisions limiting the discretion

C. A.

1929

 THE
YOUNG
SID.
Greer L.J.

C. A.
1929

THE
YOUNG
SID.
Greer L.J.

of the judge in a case which was tried by a judge alone, as there were in a case which was tried by a jury, where good cause had to be made out. The position so remained until the decision of the House of Lords in *Donald Campbell & Co., Ltd. v. Pollak* (1), where attention was redirected by their Lordships to the words of the rule, and it was held that neither the judges of first instance, nor the Court of Appeal, could lay down limits as to what discretion could, or could not, be exercised by a judge trying a case without a jury, except to the extent to which my Lord has referred, where totally irrelevant considerations had undoubtedly influenced the judge in giving his decision.

The question arises now whether or not the judge did exercise his discretion. The practice, before the decision was given in this case in the Admiralty Division, as to how the discretion should be exercised, was apparently not uniform; and the judges of the Admiralty Division thought, apparently, that the practice was in favour of the view which they took—namely, that the appellant having succeeded in part should have his costs; but I cannot read the judgment of the President as meaning that they were laying that down as a matter of law. They were entitled to take into consideration the recent practice, as they knew it to be, and I read the last paragraph of the judgment as meaning that taking that into account, and taking everything else into account in the case, there were substantial grounds of appeal, that the appellant had succeeded in the appeal on those substantial grounds, and that, therefore, he ought to have his costs of the appeal.

For those reasons I think this appeal should be dismissed with costs.

SANKEY L.J. I agree. As I am not familiar with the Admiralty practice, I have ventured to send for and to look at a well known treatise on the practice in the English Courts of Admiralty, the third edition of Williams and Bruce's Admiralty Practice, which was edited by the late Bruce J.

and published in 1902; and I think there must have been some sort of, I will not say rule, because I want to use the vaguest sort of word, but some sort of understanding such as is contended for by Mr. Dunlop. It is stated, on p. 97: "Where both ships are to blame, it is the general rule that each party should be left to pay his own costs. . . . The same rule as to costs applies in the Court of Appeal, and in order to enforce care at sea, the Court of Appeal will not, when both ships have been to blame, allow, unless in some exceptional case, either ship to gain anything by the litigation. Thus where one of two ships has been held alone to blame in the Court below and her owners have appealed, and in the Court of Appeal both ships have been held to blame, the successful appellant will as a general rule not obtain his costs of the appeal." A great many authorities are cited for that proposition, and on p. 459 there is a long criticism upon the decision in *The Friedeberg* (1), and it says: "The attention of the Court of Appeal does not appear, from the report of the case of *The Friedeberg* in the Law Reports, to have been called to the numerous cases in the Court of Admiralty and Admiralty Division subsequent to the case of *The Empress Eugénie* (2), in which the notion that any hard and fast rules existed as to the incidence of costs in the Admiralty Registry was expressly repudiated."

C. A.

1929

 THE
YOUNG
SID.

 Sankey L.J.

If those are correct statements as to the practice in the Admiralty Court, they do not convey to my mind that there is a hard and fast rule upon the subject which can be treated as a rule of practice. If there were I think it would be wrong. Personally I rather think it is a list of instances in which the Court has or has not given costs in the particular case, which may serve as a guide to a Court trying subsequent cases, but which is not binding upon such a Court. To begin with, if there were such a hard and fast rule, it would contravene Order LXV., r. 1, as to costs, which has statutory authority, and which expressly provides that the costs shall be in the discretion of the Court or judge.

(1) 10 P. D. 112.

(2) (1860) Lush. 138.

C. A.

1929

THE
YOUNG
SID.

Sankey L.J.

It may have been, in the old days of Admiralty, where you simply had the issue both to blame or one only to blame, that the rule was workable. I am not at all sure how far it is workable, having regard to the passing of the Maritime Conventions Act, 1911, in which rules were established, again statutory rules, as to the apportioning of blame. Therefore the fact that that Act was passed does, to some extent, throw some doubt upon the earlier decisions being of a binding character and making a hard and fast rule, as is contended.

Further since the decision in *Donald Campbell & Co., Ltd. v. Pollak* (1) Mr. Dunlop cannot take up the attitude which he would desire to take up. What the Lord Chancellor said in that case was this: "A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our Courts would never in fact be realized—a judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case"—and these are strong words—"then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited

(1) [1927] A. C. 732, 811, 812.

by the statute from entertaining an appeal from it." The history of that case is well known. For some years previously there had been a tendency in this Court to interfere with the discretion of the learned judges of first instance, and an attempt was made by Atkin L.J. (as he then was) in *Ritter v. Godfrey* (1) to codify the cases as to costs. The effect of that codification was to take away a discretion which the statute had given to judges of first instance, and which by the decision in *Donald Campbell & Co., Ltd. v. Pollak* (2) was restored to them by the House of Lords. Therefore, for those reasons, the words of the order itself, such considerations as may be derived from remembering the recent passing of the Maritime Conventions Act, and the decision in *Donald Campbell & Co., Ltd. v. Pollak* (2), I have come to the conclusion that the position contended for by the appellant in this case cannot be maintained. In other words, what it was sought to do was this: it was sought by an alleged practice of the Court of Admiralty to fetter the discretion of the judge sitting in Admiralty. As I have said, I have very great doubts whether the rule existed in the sense that Mr. Dunlop would have us think that it existed. All, I think, that took place was this, that a very large number of cases were reported upon costs, which no doubt are extremely useful as a guide for future judges as to how to exercise their discretion in particular cases; but I doubt if those cases ever formulated a hard and fast rule. If they did formulate a hard and fast rule, in my opinion that rule cannot now be maintained.

For these reasons I am of opinion that the Court below was correct in its determination, and that the appeal should be dismissed.

Solicitors for the appellants: *Holman, Fenwick & Willan, for Wiltshire, Sons & Jordan, Lowestoft.*

Solicitors for the respondents: *Botterell & Roche, for Chamberlin, Talbot & Bracey, Great Yarmouth.*

(1) [1920] 2 K. B. 47.

(2) [1927] A. C. 732, 811, 812.

1928

THE VECTIS.

Oct. 16, 17,

18 ;

Nov. 22, 23. *Shipping—Damage—Contact with Anchor in improper Position—Navigation of Milton Creek, River Swale—Milton Creek By-laws.*

1929

Jan. 25 ;
April 9, 10.

The plaintiffs, as owners of the barge *H.*, brought an action in the Mayor's and City of London Court against the owners of the barge *V.* in respect of damage sustained by the *H.* in Milton Creek, River Swale, through coming in contact with the *V.*'s anchor, which was admittedly being carried in an improper position, with the stock projecting over the bows, in breach of one of the Milton Creek by-laws. But for the position of the anchor, the use of fenders would have avoided damage to either vessel.

The judge held that the master of the *H.* knew of the position of the anchor and took the risk of coming in contact with the *V.* when the rush of the flood tide swung the *H.*, which was aground, athwart the creek and into contact with the *V.* lying moored on the opposite bank. He found that the master of the *H.* was negligent in not taking measures to avoid coming in contact with the *V.*, and, on the authority of *The Monte Rosa* [1893] P. 23 (which he thought was in conflict with the decision in *The Dunstanborough* [1892] P. 363n.), gave judgment for the defendants. The plaintiffs appealed :—

Held, that the case must be further heard ; that unless the master of the *H.* not only knew of the dangerous position of the anchor, but also had time and means to avoid contact with it, the plaintiffs would be entitled to succeed.

The decisions in *The Monte Rosa* (supra) and *The Dunstanborough* (supra) considered and explained.

On the further hearing, which took place before the Divisional Court :—

Held, that the defendants had not established either knowledge of the position of the anchor or negligence on the part of the master of the *H.*, and that the appeal succeeded.

Per Hill J. : that the *H.* could not be considered as a vessel under way colliding with a moored vessel and therefore prima facie negligent.

APPEAL from a decision of the judge of the Mayor's and City of London Court in favour of the defendants in an action of damage by collision. The plaintiffs (appellants) were the owners of the sailing barge *Hydrogen* ; the defendants (respondents) were the owners of the sailing barge *Vectis*. The facts are summarized in the headnote and are fully set out in the judgments of the Divisional Court.

Dunlop K.C. and *Owen Bateson* for the appellants. The *Hydrogen* was not to be regarded as a vessel under way. She was aground without negligence in the ordinary course of

navigation of the creek. The judge, therefore, was wrong in holding that the fact that the *Hydrogen* came into contact with the *Vectis*—a harmless bump but for the improper position of the anchor—was evidence of negligence and cast on the *Hydrogen* the burden of proving that the contact could not have been avoided by the exercise on her part of reasonable care. The burden of proving that the *Hydrogen* was negligent was on the defendants; and mere contact in such a place as Milton Creek is not *prima facie* evidence of negligence. If there was negligence on the part of those on the *Hydrogen*, both vessels ought to have been held to blame. The Admiralty rule is that where a collision is caused by the negligence of one of the ships, but there would have been no damage or less damage if the other ship had not also been negligent, the division of loss rule applies, as in *The Dunstanborough* (1): see also *The Margaret* (2); *The Kaiser Wilhelm II.* (3); *The Plym* (4), where the plaintiffs could have avoided the consequences of the defendants' negligence up to the last moment. The decision in *The Monte Rosa* (5), which the judge in the Court below followed, must be reconsidered in the light of the Maritime Conventions Act and the numerous decisions since that Act, particularly Lord Birkenhead's observations in *The Volute*. (6) *The Monte Rosa* (5) was an example of the maxim "*Volenti non fit injuria*," which has no application to the facts of the present case; neither does the *Davies v. Mann* (7) principle apply in Admiralty to cases where the negligence of the defendants, as here, was continuous and concurrent with the negligence, if any, of the plaintiffs: see the observations of Bankes L.J. in *The Jupiter* (8) and of Lord Sumner in *The Active*. (9)

[Reference was also made to *The Julia* (10); *Spaight v. Tedcastle* (11); *The Margaret* (12); *Anglo-Newfoundland*

1928

THE
VECTIS.(1) [1892] P. 363*n*.

(2) (1881) 6 P. D. 76.

(3) (1915) 85 L. J. (P.) 26.

(4) (1921) 9 Ll. L. R. 489.

(5) [1893] P. 23.

(6) [1922] 1 A. C. 129.

(7) (1842) 10 M. & W. 546.

(8) (1927) 28 Ll. L. R. 224.

(9) (1920) 2 Ll. L. R. 505.

(10) (1861) Lush. 224.

(11) (1881) 6 App. Cas. 217.

(12) (1884) 9 App. Cas. 873.

1928 *Development Co. v. Pacific Steam Navigation Co.* (1); *The Ovingdean Grange* (2); *The Hero* (3); *The Peter Benoit* (4);
 THE
 VECTIS. *The Karamea* (5); *The Canton* (6); and *Letang v. Ottawa Electric Ry. Co.* (7)]

Stephens K.C. and *Trapnell* for the respondents. The decision in *The Dunstanborough* (8) was based on the facts of that particular case and has no bearing on the decision in *The Monte Rosa*. (9) On the facts of the present case the judge was right in applying the principles of *The Monte Rosa*. (9) The *Vectis* was moored and she was run into by the *Hydrogen*, which was under way and therefore had the duty to keep clear. The *Hydrogen* was negligent. She was wrong in sailing so far up the creek without knowing the depth of water, and, having got into the position in which she did, in not putting out a rope to the wharf. The sudden rush of tide was to be expected and should have been guarded against. On the evidence, those on the *Hydrogen* must be taken to have known of the position of the anchor of the *Vectis*, and, there being no one on board her, while there was still water enough, should have gone across the creek in their boat and slacked away the anchor. In the words of Lord Birkenhead in *The Volute* (10) there was "subsequent and severable negligence" on the part of the plaintiffs. They took the risk; it was really a case of "volenti non fit injuria." Judgment, therefore, was rightly entered for the defendants. If the negligence of the defendants was in fact a contributory cause of the damage, then both vessels are to blame and the division of loss rule should be applied.

Dunlop K.C. in reply. Many of the "both to blame" cases decided since *The Monte Rosa* (9) show that the *Davies v. Mann* (11) rule is limited to those cases where there has been a subsequent and severable act of commission, not simply of omission. In *The Monte Rosa* (9) the ship's negligence

(1) [1924] A. C. 406.

(2) [1902] P. 208.

(3) [1912] A. C. 300.

(4) (1915) 13 Asp. M. L. C. 203.

(5) [1922] 1 A. C. 68.

(6) (1928) 31 Ll. L. R. 289.

(7) [1926] A. C. 725.

(8) [1892] P. 363*n*.

(9) [1893] P. 23.

(10) [1922] 1 A. C. 129.

(11) 10 M. & W. 546.

was antecedent; her anchor was obviously in an improper position and the tug, a free agent, sheered across her bows. Unless consistent with it, the decision in *The Volute* (1) inferentially overrules *The Monte Rosa*. (2)

1928
THE
VECTIS.

Cur. adv. vult.

1929. Jan. 25. The following judgments were read:—

THE PRESIDENT (LORD MERRIVALE). The litigation between the parties here arises out of a casualty which occurred in the course of the navigation of barges upon Milton Creek, a tidal channel, through which at high tide communication by water can be had between the Kentish town of Sittingbourne and the estuary of the Thames. The casualty itself was not serious; the sailing barge, which was getting under way, was swung round on a sudden swell of the incoming tide so that her starboard quarter brought up against the fore part of the outer barge in a tier of three on the other side of the creek, and, by reason that the anchor of the barge at moorings was set across her stem with the fluke and stock exposed on the starboard side, the stock drove through the starboard quarter rail of the *Hydrogen* and caused damage.

Milton Creek is under the control of conservators. In 1899 they were incorporated by statute and in 1906 they made by-laws, by one of which it is provided as to “any vessel lying alongside a wharf and any vessel or vessels lying outside of her,” that “the anchors of such vessels shall be slacked on to the inside bow and no . . . projections shall be permitted on the outside of any such vessel.”

The damaged craft was the sailing barge *Hydrogen*, and her owners became plaintiffs in an action in the Admiralty jurisdiction of the Mayor’s and City of London Court against the owners of the barge at moorings, the sailing barge *Vectis*. The plaintiffs allege negligent and unlawful exposure of the anchor of the *Vectis* in a manner calculated to cause damage, and damage ensuing. The defendants allege that the

(1) [1922] 1 A. C. 129.

(2) [1893] P. 23.

1929

 THE
 VECTIS.

 The President.

plaintiffs' damage was due to negligence on board the *Hydrogen*; that the *Hydrogen* was negligently allowed to swing on the flood tide; that she ought to have been secured to the shore by moorings to prevent such swinging: that before getting under way the plaintiffs' servants ought to have seen the position of the anchor and dealt with it; and that they took the risk of fouling the anchor voluntarily.

At the hearing the defendants relied on the judgment of Gorell Barnes J., as he then was, in *The Monte Rosa* (1), a case where in the navigation of the Thames risk was voluntarily incurred of striking an anchor improperly placed at the stem of a steamship, and it was held that the sole cause of the damage was the negligent navigation of the tug. The plaintiffs relied on the judgment of Sir Francis Jeune, as he then was, in a somewhat earlier case, *The Dunstanborough* (2), where a steamer's anchor, improperly carried, having damaged a barge which was lying unattended in proximity to her, steamer and barge were held both to blame. In the present case the learned judge in the Court below reserved judgment and eventually held—with serious misgivings, as he states—that the case fell within the authority of *The Monte Rosa* (1) and gave judgment for the defendants, finding the plaintiffs' crew alone to blame for the collision.

On the appeal very able arguments were addressed to the Court on behalf of each party by counsel of much experience in Admiralty on the various nice considerations which arise when two vessels have been in collision, and, there being cross charges, regard has to be had to the question of antecedent and subsequent injury, proximate and remote causes of injury, contributory negligence which excludes a claim for compensation, and the common negligence of plaintiffs and defendants in the transaction at issue which, in Admiralty, leaves them each contributory to the damage which their combined negligence has caused. The attention of the Court was properly called to a long series of authorities on the law. As to the authorities, whether those considered below or cited before us, my own view of the matter is that they leave the

(1) [1893] P. 23.

(2) [1892] P. 363*n*.

case a fairly simple one, if only the material facts are distinctly ascertained.

1929

THE
VECTIS.

The President.

The singular character of the creek as a place of navigation for barges is a not unimportant factor. It is not an arm of the sea or a navigable stream in any ordinary sense of the words. Sittingbourne, to which it gives access, is an inland town to which barges can proceed from the tidal waters of the West Swale twice in the day when the creek fills at high tide. Between tides this channel is dry except for a runlet of fresh water at the lowest level. According to the evidence the area of the tide-way is limited by mud banks which in places slope somewhat steeply. The full distance between the wharves at the material point seems from the chart to be about 200 feet. The width at which at high water barges can be navigated was variously stated.

On the westward of the creek at the material time three barges were moored in a tier, the *Vectis* outward. They would each probably occupy not less than 25 feet of width. The *Hydrogen* was some 40 feet from the wharf or bank on her port side, and it was said some 100 feet from the *Vectis*. The *Hydrogen* is a barge of 94 feet 8 inches length, and 22 feet 6 inches beam, and a maximum draught of 8 feet. Barges are not unlikely, it appears, to get aground along the creek even at high tide. The *Hydrogen* grounded on a Sunday afternoon, and her master expected to proceed on the early morning tide next day. As the tide rose the *Hydrogen's* crew were getting her under way to complete her trip to Sittingbourne when a sudden swell of the tide, as was said, took charge of her, and flung her across the creek, so causing the collision. The negligence on the part of the *Vectis* in the disposal of her anchor is undisputed. As to the *Hydrogen*, it is said that, knowing the anchor was in a position which might involve danger to his barge in such circumstances as in fact occurred, her skipper "took the risk" of fouling her; and that in a situation in which the flowing tide might throw his barge across the creek, and so bring her quarter in contact with the anchor of the *Vectis*, he neglected to secure his barge by a rope or ropes made fast

1929

THE
VECTIS.

The President.

on the bank so as to prevent such an occurrence. The burden of proof in respect of these allegations is on the defendants, and if they leave the issue or issues in doubt they fail.

The learned judge says in his judgment that the master of the *Hydrogen* saw the anchor of the *Vectis* in its dangerous position. "The anchor is there improperly" the learned judge says in his judgment. "It is well within the knowledge of the master of the *Hydrogen*. He saw it was there; he said he never thought about the anchor, but he took the chance of clearing the vessel. He said he hoped he would clear . . . he took the risk. The anchor, he said, 'never crossed my mind, I thought I should never touch the *Vectis's* stem. I thought I might strike the curve of the bow.'" Whether the knowledge thus imputed to the master of the *Hydrogen* was knowledge that the anchor was dangerously placed before he set about getting under way on the Monday morning; whether there was any practical danger if no sudden tidal wave occurred, and whether such a surge of the tide was a common incident of navigating the creek, and known to the master of the *Hydrogen*, the judgment does not say, and I can only surmise.

Whether barges taken up and down the creek on the tide are usually tied up to the bank or a wharf, if they happen to go aground for want of depth of water at some point in the two miles or more of transit, cannot be stated with any certainty upon the evidence. A witness of some apparent experience who was called said that to use ropes in such a way would be highly dangerous. Whether such a rope or ropes could hold the *Hydrogen* I do not know. Having been aground, lodged in the mud, it is said that her stern slipped down a ten foot mud bank, while her stem was still held on the ground. If in face of such difficulties the learned judge had found definitely that it was negligent not to tie up the *Hydrogen* to the bank or wharf, and that if the barge had been so secured the danger of the collision would not have occurred, the case would have stood on definite findings. What the learned judge says is this: "It appears that the master of the *Hydrogen* could have moored to a ring somewhere

about opposite her amidships, or possibly a little higher up. . . . It seems to me something effective might have been done with that rope." As to a further suggestion of the defendants that an anchor could have been utilized he adds this: "Further, the anchor might have been used." These are not the affirmative findings which the defendants require in order to make good their charge of negligence in respect of mooring or making fast.

As I have already said, I do not think the question of the alleged relative negligence of the parties is necessarily a question of technical difficulty. The judgment in *The Monte Rosa* (1), upon the findings made by the learned judge, seems to me to be consistent with the general run of authority, and not inconsistent with the judgment in *The Dunstanborough*. (2) This latter judgment the learned judge had had under consideration in a Divisional Court in *The Hornet* (3) not long before he heard *The Monte Rosa*. (1) The view the learned judge took, as is concisely indicated in an observation he made in the course of the hearing, as well as by the judgment, was that those in charge of the plaintiffs' vessel, seeing the anchor of the *Monte Rosa* in a wrong position, chose to run against it. "The anchor," he said in his judgment, "was a source of danger which was apparent to them, and yet they were guilty of negligence in not avoiding coming in contact with it."

Long before *The Monte Rosa* (1) Lord Blackburn, in the House of Lords, had epitomized the rule of law on the matter in question, in his opinion in *Cayzer v. Carron Co. (The Margaret)*. (4) The noble Lord made this statement: "Where the cause of the accident is the fault of one party and one party only, Admiralty and Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both . . . the rule of the Common Law says . . . neither shall recover. . . . Admiralty says, on the contrary,

1929

THE
VECTIS.

The President.

(1) [1893] P. 23, 31.

(3) [1892] P. 361.

(2) [1892] P. 363*n*.

(4) (1884) 9 App. Cas. 873, 881, 887.

1929

THE
VECTIS.

The President.

if both contributed to the loss it shall be brought into hotchpotch and divided between the two." In the same case Lord Watson dealt with the cross charges of negligence, and the conditions under which negligence is held to be "contributory." "Assuming," he says, "that there was a breach of the rule and culpable neglect" on the part of the *Clan Sinclair* at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*." The *Margaret*, knowing what was the breach of rule by the *Clan Sinclair*, might with ordinary care have avoided the collision, and, therefore, she was alone to blame. *H.M.S. Sans Pareil* (1) illustrates the operation of the broad principle so stated. In *The Hero* (2), where there were mutual acts of negligence in the very matter of the collision, both parties were held jointly liable for the damage caused.

Lord Phillimore, in his opinion in the House of Lords in *H.M.S. Active* (3), explains the cases in which negligence of one party may be actionable and involve liability although it is not concurrent in time with the negligence of the other. "One may be consequent on the other," he says. "And it is possible to give weight to an act of negligence which embarrasses the other party while at the same time not acquitting the embarrassed party."

The various authorities above cited are dealt with in the judgment in *The Volute* (4), where the effect of contributory negligence in claims for damages in Admiralty is considered at large, and the causative effects of antecedent and subsequent and severable negligence are apportioned. The judgment in *The Volute* (4), however, does not purport to enunciate any new principle, and so far as the older authorities are concerned I do not know that the relevant rule can be found more concisely stated than as it is summed up in Lord Halsbury's *Laws of England*, vol. 26 (Shipping and Navigation, Part XI., s. 749). Lord Salvesen there differentiates non-causative from causative negligence in this statement: "In cases of antecedent and subsequent fault or negligence, a

(1) [1900] P. 267.

(2) [1912] A. C. 300.

(3) (1920) 2 Ll. L. R. 505, 508.

(4) [1922] 1 A. C. 129.

party by his antecedent fault is not supposed to have even partly caused the damage by collision, if the other party afterwards could have avoided the damage by exercise of reasonable care and ordinary skill."

1929

 THE
VECTIS.

The President.

As the present case stands, there is no distinct finding as to whether the master of the *Hydrogen* could in the circumstances which existed, have avoided the damage that barge suffered by the exercise of reasonable care and ordinary skill.

In my opinion the judgment appealed from must be set aside. The facts, however, are not so ascertained by findings, or so clearly apparent in the evidence, that some other judgment can be founded upon them. The case ought therefore to be further heard. How, when, and where, is matter for the careful consideration of the parties. No question of principle is at stake, and the cost and labour which have already been bestowed on the case are out of all proportion to the amount involved.

HILL J. I agree, and but for the fact that in argument a number of general questions were fully discussed I should be content to say I agree, but in order to clear my own mind I have written out my judgment on the questions raised and I think it better that I should read it.

The collision in question was between two barges. They were both accustomed to use Milton Creek, a creek of the River Swale. It dries at low water. Barges in the ordinary course of navigating it ground and float again. There are a number of wharves along the creek at which barges lie. The *Vectis* came up the creek on the afternoon tide of Sunday the 5th June and moved head down, third barge out of three alongside a wharf on the Milton or west side of the creek. She there lay with her starboard side to the channel. Later, on the same tide, the *Hydrogen*, bound for a destination further up the creek, sailed up and, in winding, grounded forward and, though she tried to haul herself afloat by means of a rope passed to the *Vectis*, she failed to move, and as the tide ebbed she grounded throughout her length, heading up the creek. She was on the Sittingbourne or east side of the

1929
THE
VECTIS.
Hill J.

creek. As she lay the stem of the *Vectis* was about abreast of the midships of the *Hydrogen*. At some time after the attempt to haul the *Hydrogen* off, the master and crew of the *Vectis* went on shore, leaving the anchor of the *Vectis* in a position which was contrary to the Milton Creek by-laws; it should have been slacked on to the inside, i.e., the port bow. It was, in fact, tight up, with the shank across the stem and the stock projecting on the starboard side. In this position it was rigid. It was not suggested that it was wrong to leave the *Vectis* unattended. The crew of the *Hydrogen* also went ashore in the *Hydrogen's* boat; the master remained on board. On the Monday morning, while there was still no one on board the *Vectis*, the crew of the *Hydrogen*, when the tide permitted, came on board the *Hydrogen*. About half an hour later, the tide swung the *Hydrogen* athwart, the forefoot still remaining on the ground, and the starboard quarter of the *Hydrogen* came in contact with the *Vectis* forward, and the stock of the *Vectis's* anchor pierced the *Hydrogen's* starboard quarter rail. Fenders had been put out by the crew of the *Hydrogen*; no damage was done to the *Vectis*; and the only damage done to the *Hydrogen* was by contact with the stock of the *Vectis's* anchor.

The negligence of the *Vectis* being clear, the judge applied his mind to two questions: (1.) was there negligence on the part of the *Hydrogen*; (2.) if there was, ought the loss to be divided or must the plaintiffs—the owners of the *Hydrogen*—entirely fail. On the first question he found against the *Hydrogen*. On the second, he expressed himself as faced with a serious conflict of judicial decisions in *The Dunstanborough* (1) and *The Monte Rosa* (2), and, with hesitation, followed *The Monte Rosa* (2), and, having stated certain conclusions of fact, held that the plaintiffs were not entitled to recover.

On this appeal, the first question is whether there was any evidence on which the judge could find that the contact of the *Hydrogen* with the *Vectis* was wrongful and caused by negligence on the part of the *Hydrogen*. This involves the

(1) [1892] P. 363*n*.

(2) [1893] P. 23.

question whether the judge rightly directed himself in this matter. The other questions arise only if the *Hydrogen* was rightly found guilty of negligence. They are (1.) whether the judge rightly directed himself as to the law and (2.) whether, if he did, he found, and had evidence on which he could find, the facts necessary to the result in law at which he arrived—namely, that the owners of the *Hydrogen* could recover nothing.

As to the *Hydrogen*'s negligence, the judge began by treating the case as one to which the principle "*res ipsa loquitur*" applied. He said: "his barge is in a position where it is intended to move with the tide and there is a stationary barge, the *Vectis*, opposite, and if he so manages or navigates his barge so as to come in contact with the stationary barge it is impossible to say he is not guilty of negligence." I do not think that that is a correct view of this case. It was not suggested in evidence that the *Hydrogen* did anything wrong in sailing up the creek as she did. All that was in the ordinary use of the creek. As all who use the creek know, vessels bound for the upper wharves sail up as far as they can with the tide and ground and proceed on the next tide. It was not suggested in cross-examination that, if there was a risk of grounding near other vessels lying at a wharf, the navigating vessel ought to anchor or moor before she reached that spot. It is probable that, under such conditions, no vessel could ever get to the upper parts of the creek. The case, therefore, was not a case where a vessel voluntarily and negligently takes up a position too near a vessel moored. After the *Hydrogen* once grounded, she was not at any material time under way, with unrestricted power to control her own movements. With the making tide she became waterborne aft but continued to be held forward, and it was due to that fact that she swung athwart. She was not being navigated at all. She could not prevent herself floating aft first. The tide might or might not swing her athwart; it would depend upon the time at which she floated forward. The mere fact of contact in the circumstances of this case was not, in my judgment, *prima facie* evidence of negligence. It was

1929

THE
VECTIS.
HILL J.

1929

THE
VECTIS.
HILL J.

necessary to go further and inquire whether the *Hydrogen* neglected some precaution which a vessel in her position ought to have taken, having regard to the *Vectis*. The duty of the *Hydrogen* would vary according as those in charge of her knew or did not know of the dangerous position of the *Vectis's* anchor. But for the anchor, as the judge finds, there would only have been a harmless bump such as frequently occurs. Apart from knowledge of the dangerous position of the anchor, I can see no reason for saying that there is negligence in not preventing a harmless bump between barges. Such bumps are frequent in the ordinary working of barges, and in this narrow creek were probably incidental to the ordinary use of the creek. They involve neither *damnum* nor *injuria*. Further, there was no evidence that it was usual for vessels grounding in the creek to put out moorings. The master of the *Hydrogen* said that it was not usual. Mr. Harvey, the surveyor, said the same thing. The master of the *Vectis* did not say that it was usual; he only said that he sometimes did it for his own convenience, when about to leave the barge unattended. But, of course, if it is known that special circumstances exist which involve the risk that a bump ordinarily harmless may be harmful, a duty may arise to take extraordinary means to prevent harm.

Two questions therefore arose for decision: (1.) Did the master of the *Hydrogen* know of the dangerous position of the anchor, and, if he did, had he that knowledge at any time when he could have taken precautions, if there were any which could be taken, and (2.) were there any precautions which he could and ought to have taken. On neither of these points is the finding of the judge clear. As to knowledge he says: "This anchor is there improperly. It is well within the knowledge of the master of the *Hydrogen*. He saw it was there." The judge had just before cited passages from *The Monte Rosa* (1), and I think that the fair meaning of the judge's words is that the master of the *Hydrogen* was aware of the dangerous position of the anchor. Moreover I think that there was evidence on which the judge could so find.

But there is no finding as to when the master of the *Hydrogen* became aware of the dangerous position of the anchor. There was, I think, evidence on which it could have been found that he became aware at some time on Sunday, but none on which it could be found that he became aware before the crew in the boat left the *Hydrogen* on that afternoon. There was therefore no evidence on which it could be found that on Sunday the master ought to have done anything. After the boat left, he could do nothing until it returned on Monday morning. The boat returned when the *Hydrogen* was still "just aground." The crew were on board half an hour before the *Hydrogen*, as it turned out, began to swing. The tide (apparently held up by a north-west wind) was late and then came with a rush. The question seems to me to be whether in that half hour the master of the *Hydrogen*, assuming that he knew of the dangerous position of the anchor, could and ought to have taken precautions to avoid the risk of contact with the anchor. On this matter of the *Hydrogen's* negligence there is no satisfactory finding by the judge.

Starting with the view that the contact was in itself evidence of negligence, the judge naturally treated the case as one in which the burden was on the *Hydrogen* to show that nothing the *Hydrogen* could do would have prevented the contact. He goes somewhat further. But there is no definite finding that the master of the *Hydrogen* could and ought to have done something which would have prevented the contact and neglected to do it. Still less is there a definite finding that he could have done it after he knew of the dangerous position of the anchor. What the judge says, and he says it without reference to any particular time, is this: "It was suggested on behalf of the *Vectis* that he might have put a rope out. It appears he could have moored to a ring which was somewhere about opposite her (i.e. the *Hydrogen*) about amidships or possibly a little higher up. It was said in answer to that—the rope might have broken, and some evidence was called to show it might. But these are mere possibilities. It is not enough for me that evidence was given that the vessel might have slid down and the rope

1929

 THE
VECTIS.

 Hill J.

1929

THE
VECTIS.

Hill J.

might have broken. It seems to me something effective might have been done with that rope. Further the anchor might have been used." As to the anchor, one asks when and in what direction it ought to have been laid out; but it is unnecessary to consider that further, for the point was given up by counsel for the respondents. As to the mooring, I cannot treat the words of the judge as a finding that a rope, if got out, would have been effective to hold up the stern of the *Hydrogen* and prevent her swinging athwart, nor as a finding that a rope could have been got out with that effect on the Monday morning. It is at most a finding that a rope could at some time have been carried to the ring, a finding which meets Mr. Dunlop's point that to moor to the ring on the wharf would have been a trespass. But there is no other definite finding. The judge was, I think, bound to consider the evidence and arrive at a definite conclusion on the other points, before he could hold the *Hydrogen* negligent. [His Lordship dealt with the evidence and continued as follows:] From what I have said it is manifest that there was much to be considered before it could be found that the *Hydrogen* was negligent in not putting out a rope. It has not been considered. On the other hand I do not think that it would be right to say that there is no evidence upon which the *Hydrogen* could be found to blame, so as to justify this Court in entering judgment for the plaintiffs. The case must be retried and the facts ascertained.

When the facts are once ascertained, there is, in my opinion, no difficulty about the law. If the master of the *Hydrogen* knew of the dangerous position of the anchor, and, having that knowledge, had the time and the means to avoid contact with it and ought as a reasonably careful man to have used those means and did not use them, and in consequence the *Hydrogen* came in contact with the anchor, then, it being admitted that there was no duty on the *Vectis* to have any one on board to let go the anchor, the master of the *Hydrogen* had only himself to thank for the damage, and the plaintiffs cannot recover. But unless these facts are proved, the plaintiffs are entitled to recover in full.

For the purposes of this appeal it is, in my opinion, unnecessary to consider in detail the authorities, cited in argument, where both ships were being navigated and each was negligently navigated. In such cases more difficult questions may arise as to whether both negligences combined to cause the collision. Such were the problems upon which *The Volute* (1) has given us guidance. But it cannot be doubted that when a position of danger negligently created by B. is fixed and known to A. and A. by taking reasonable care can avoid receiving or doing damage and does not, and there is no other negligence of B., then A., as plaintiff, cannot recover and, as defendant, is solely liable. To give an illustration, ship B. is negligently at anchor in an improper place; ship A. under way in daylight sees B., sees her position, sees her in plenty of time, and is not hampered in her own navigation by the position of B. and yet runs into B. I have no doubt that A. cannot recover and is solely liable. That is only the principle of *Davies v. Mann* (2) applied to ships.

Such a case is an illustration of the first proposition in *The Volute*. (3) The proposition is there stated so as to cover the case where the defendants' negligence is subsequent and severable. But it applies equally to cover the case where the plaintiffs' negligence is subsequent and severable. The true aspects of the principle are stated in the fifth and eighth propositions of Lord Esher M.R. in *The Bernina*. (4) Stating the principle as it applies to the present case it is this—A. is suing for damage received by collision. B. was negligent, but his negligence had brought about a state of things in which there would have been no damage if A. had not been subsequently and severally negligent. A. recovers nothing. The principle is illustrated by *The Hornet* (5): "Assuming, however, that there was no one there (i.e. on the barge) and that the stern (i.e. of the barge) did come out, we cannot bring ourselves to think that that raises any case which

1929

 THE
VECTIS.

 Hill J.

(1) [1922] 1 A. C. 129.

(3) [1922] 1 A. C. 129, 136.

(2) 10 M. & W. 546.

(4) (1887) 12 P. D. 58, 61.

(5) [1892] P. 361, 365.

1929

THE
VECTIS.
Hill J.

would make the barge liable as well as the tug, on the ground that there was contributory negligence; for, whichever way it is put, it appears to be clear that the absence of the person on the barge had nothing to do with the collision. There was plenty of light, and the *Hornet* could see perfectly well where the barge was." In the course of argument in *The Monte Rosa* (1) Gorell Barnes J. asked whether the principle of *Davies v. Mann* (2) did not apply, and upon this principle that case was decided. *The Volute* (3) does not say that it was wrongly decided, and certainly does not question the principle upon which it was decided. Even the slight doubt expressed by Lord Birkenhead (4) may be accounted for. It seems to have been overlooked that the judge's findings of fact included a finding, not that the tug might have seen the anchor, but that the position of the anchor was known to the tug.

In my opinion, when the facts of the two cases are considered, it is a mistake to suppose that there is any conflict between the decisions in *The Dunstanborough* (5) and *The Monte Rosa*. (1) The reason is that the point in which they are supposed to be in conflict did not arise in *The Dunstanborough*. (5) In *The Monte Rosa* (1) it was found that there was, in fact, no negligence in not lowering the anchor after the tug sheered towards the steamer, because there was no time to do it. The only negligences to be considered therefore were (1.) the negligence in carrying the anchor in an improper position, a position which, as was found, was known to the tug, and which must have been known to the tug all the way from Gravesend to Bugsby's Reach, and (2.) the negligence of the tug in sheering towards that anchor. In *The Dunstanborough* (5) it is obvious that, if the point had been contested, it must have been found that there was negligence in not lowering the anchor before or as soon as it touched the barge. For the steamer was being discharged, and it was as she rose that the fluke of the anchor fouled the barge.

(1) [1893] P. 23.

(2) 10 M. & W. 546.

(3) [1922] 1 A. C. 129, 136.

(4) [1922] 1 A. C. 137.

(5) [1892] P. 363n.

If, as soon as the fluke had touched the barge, the discharge had been stopped or the anchor lowered, no damage would have been done. It is not surprising, therefore, that no evidence was called for the steamer, and that the argument was that the barge was guilty of contributory negligence, followed by an attempt to show that the common law and not Admiralty law applied. It would have profited nothing for the steamer to argue the main point on which the steamer succeeded in *The Monte Rosa*. (1) If, as soon as the anchor touched the barge, the barge could have avoided the damage by veering, so could the steamer by lowering the anchor or stopping the discharge. The damage was caused by a combination of negligences. I think *The Plym* (2), which was cited in argument, may be supported on similar grounds; if the man in charge had been awake it may well be that he could have done something as soon as the wash of the steamer's propeller began to act upon the barge.

It is only necessary to add that in my view the matter we are now considering is wholly unaffected by the Maritime Conventions Act. The Act in s. 1, sub-s. 1, deals with cases where by fault damage is caused, and proviso (b) is: "Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed." "Fault" here means, as it meant in s. 25, sub-s. 9, of the Judicature Act, 1873, negligence, neither more nor less. The basis of an action of collision, whether on land or sea, whether at common law or in Admiralty, is damage caused by negligence. The investigation of the facts is often simpler at common law, for when it is found that the plaintiff's negligence has been a cause, you need inquire no further; he fails: whereas in Admiralty you have to inquire further, for if both negligences have in combination been the cause, damages have to be apportioned. But in determining whether both negligences were the cause or only the negligence of one, you have to apply the same principles in Admiralty as at common law. I agree that the case must be further tried.

(1) [1893] P. 23.

(2) 9 Ll. L. R. 489.

1929

THE
VECTIS.

It was agreed that the further trial should be before the Divisional Court, and on April 9 and 10 some of the witnesses were recalled and additional evidence was given. The arguments, which were mainly directed to the facts, sufficiently appear from the judgments.

THE PRESIDENT (LORD MERRIVALE) after stating the issues continued as follows: With knowledge of what was said at the hearing below and after hearing the plaintiffs' witnesses to-day I am satisfied that those in charge of the *Hydrogen* did not know the position of the anchor of the *Vectis*. It is said that they ought to have known, and I have considered that question. It is said that there was a prevalent practice for barges to carry their anchors contrary to the by-law. I am satisfied that there was not such a prevalent practice. I believe that the rule is frequently broken, but I believe also that careful masters of barges do what the master of the *Hydrogen* and the harbour master of Milton Creek each said they did.

There remains the question whether, apart altogether from the way in which the *Vectis* was carrying her anchor, those on the *Hydrogen* ought at any time to have put out a rope or ropes in order to minimize the danger of collision between the *Hydrogen* and the barges on the other side of the creek. First, with regard to the Saturday afternoon when she grounded in a perfectly ordinary way. It was to be expected that the tide which had left her aground would take her off the ground as the next tide rose, and, with the normal precautions taken by those in charge of barges in Milton Creek, they would have avoided reasonable possibility of any peril by having their fenders out and standing by them when they came afloat. I can see no reason for saying that, if a barge navigating this creek happens to be held up on a mud bank by reason of shallow water, elaborate precautions which nobody thinks of taking and which would involve equipment, time and labour, should be used to add to the expense of navigating the creek. The precautions suggested are not practical. The question then arises whether next

morning, when the flood returned, the master should have realized that with a sudden rise of the tide—the rise of which he said had been delayed—there might be some danger of collision with the *Vectis*. My own impression is that it was a collision that in ordinary circumstances—apart from the *Vectis*' anchor—would have been deprived of the possibility of damage by the crew standing by with their fenders, and that they would have used their fenders under the circumstances. Assume, however, that the vessels were in such a position that the possibility of danger of collision had to be considered. It was argued that the *Hydrogen* had a variety of moorings of which use might have been made. The master, however, said that if he had used any of the ropes he had on board that could have been effective, they would have carried away, and there is a good deal of evidence in support of that suggestion.

But in my judgment there is a preliminary question, and that is whether in the circumstances that then existed, and when the master of the *Hydrogen* had knowledge of the probable sudden rise in the tide in the last hour of the flood—apparently an unusual circumstance—it can be found that he could and ought to have taken action that would have averted the collision? In my opinion it cannot so be said. Those on the *Hydrogen* were bargemen, not superhuman creatures able to exercise extraordinary feats of skill and prescience. They thought it would be all right. They had very little time to take any action, and they cannot be found negligent in not taking action either in the simpler or more complex methods which have been suggested; nor indeed am I satisfied that any of these methods would have prevented the damage which occurred.

The damage was caused by the unlawful manner in which the anchor of the *Vectis* was carried and was not caused or contributed to by the failure of those on board the *Hydrogen* to exercise reasonable care or skill. In my view there must be judgment for the plaintiffs.

HILL J. I agree. The main question is whether the defendants, upon whom the onus rests, have proved any

1929

THE
VECTIS.

The President.

1929

THE
VECTIS.
Hill J.

negligence on the part of the *Hydrogen*, the *Vectis* being obviously negligent and her negligence being the immediate cause of the damage. Mr. Stephens argued that the duty of the *Hydrogen* was that of a vessel under way. On the previous occasion when the case was before the Court I dissented altogether from the contention that the *Hydrogen* should be treated as a ship that was at the time in question being navigated. She was not. The circumstances to be considered are quite different from those of one vessel under way and the other vessel moored.

The case has first to be considered apart from the question of knowledge on the part of those on the *Hydrogen* of the wrongful position of the *Vectis's* anchor. Mr. Stephens contended that the *Hydrogen*, having grounded in a locality in which she had wharves and barges on either hand of her, ought to have tied up and ought to have put out moorings. When the case was last before the Court I pointed out that there was no evidence that it was usual for vessels in the creek to put out moorings when grounded, and to-day that has been confirmed by a barge master called on behalf of the defendants who said the same thing as the master of the *Vectis* had said—namely, that if he was going home to sleep then he tied up his barge. It seems to me that it would be an extraordinarily strong course to find negligence on the part of those in charge of a barge for failing to tie up, when nobody in this creek thinks of doing so unless he is going to leave his barge entirely unattended.

[His Lordship then dealt with the questions whether moorings ought to have been put out on the Monday morning; whether the master of the *Hydrogen* knew, or must be taken to have known, that the anchor of the *Vectis* was projecting in such a way that contact with it would cause unusual consequences; and whether, in any event anything effective could have been done. On these questions his Lordship said he entirely agreed with the conclusions of the learned President, and continued as follows:] It leaves this. There was contact without negligence on the part of the *Hydrogen* which would have done no harm at all, as was proved by

the fact that the *Vectis* herself, in spite of the contact, was not damaged. There was harm done to the *Hydrogen* by reason of the breach of the by-law on the part of the *Vectis*. I agree, therefore, that there must be judgment for the plaintiffs.

1929

THE
VECTIS.
HILL J.

Appeal allowed.

Solicitors for the plaintiffs (appellants): *W. & W. Stocken.*

Solicitors for the defendants (respondents): *J. A. & H. E. Farnfield.*

E. C. M. T.

Dicta of HILL, J., at p. 236, applied.
EGERTON v. EGERTON. [1949] 2 All
E.R. 238.

PRINSEP v. PRINSEP.

1928

Nov. 26.

Divorce—Post-nuptial Settlement on the Spouses or either of them—Application of Settled Funds—Powers of the Court—Definition of Settlement—Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192.

1929

Feb. 6;
March 26.

In deciding whether a settlement comes within the meaning of "post-nuptial settlement" on the parties within the purview of the Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192, the material question is whether the settlement in question is upon the husband in the character of husband or on the wife in the character of wife or upon both in the character of husband and wife. Mere form is immaterial. The settlement may be one in the strictest sense or it may be, for instance, a covenant to pay by one spouse to the other or by a third party to a spouse. What is material is that the settlement should provide financial benefit for one or other or both of the spouses as spouses and with reference to their married state. In dealing with a settlement under the powers conferred by s. 192 the Court will not be fettered in its application of the settled funds by remote and contingent interests therein of volunteers.

Janion v. Janion (1) approved and followed.

MOTION to confirm the report of a registrar on a petition for variation of settlements.

On April 23, 1928, a decree absolute was pronounced dissolving at her instance the marriage of Marie Kate Wouldes Prinsep, the wife, with Anthony Leyland Prinsep, the husband, on the ground of his adultery. There was issue of the marriage a daughter born on May 26, 1913, the custody of whom was given to the wife.

(1) (1926) Unreported. See note post, p. 237.

1928
PRINSEP
v.
PRINSEP.

By an ante-nuptial settlement dated August 7, 1912, trust funds now amounting in value to 21,458*l.* 18*s.* 8*d.* producing an income of 1191*l.* 14*s.* 4*d.* were brought into settlement by the mother of the husband upon trust, so far as was material, to pay the income to the husband for life until he should become bankrupt or assign or charge or attempt to assign or charge the income and thereafter on certain protective trusts and after his death to pay the income to the wife so long as she remained a widow and after her remarriage to pay her a moiety of the said income for her separate use and without power of anticipation during coverture. Subject to these life interests the trust fund and income therefrom were held in trust in the events which had happened for the child of the marriage and in default of the child attaining twenty-one or marrying for the husband absolutely, and the mother of the husband further covenanted to bind her estate to pay to the trustees of the settlement during the life of the husband an annuity of 1000*l.* and after his death if the wife or any issue of the marriage should survive him an annuity of 500*l.* per annum so long as the wife or any such issue should be living on various trusts for the benefit of the wife during the joint lives of the spouses or her widowhood and that of the husband and there were provisions for resettlement of trust funds upon an after taken wife of the husband.

By a supplemental indenture of the same date the husband covenanted to make certain quarterly payments to the wife during their joint lives.

By an indenture dated August 25, 1920 (after reciting that the mother of the husband had in the year 1917 covenanted to pay the husband an annuity of 2000*l.* and that the husband, now styled the principal beneficiary, had released that annuity as from June 24, 1920), the mother of the husband now brought into settlement trust funds amounting in value to 86,500*l.* and producing an annual income of 5110*l.* in trust to apply the income at the discretion of the trustees for the benefit of the husband and his issue by any marriage and any wife of his and in the absence of wife or issue for the benefit of the husband and the persons who if he were

dead would be entitled to the trust fund and subject to these discretionary trusts of the income to hold the fund in trust first for any issue of the husband by any marriage secondly the brothers of the husband and thirdly the issue of any such brother as the husband might appoint and in default of or subject to such appointment as the wife should appoint while any issue of the husband was in existence with a final trust for all the children of the husband at twenty-one or in the case of females at marriage and the following powers were reserved, to the husband to appoint income for her life to any wife he might marry and to the trustees to revoke after the marriage the trusts declared of the trust fund and to direct the whole or part to be held for the husband absolutely or limit—and declare other trusts and appoint other trustees and after the husband attained thirty-five to declare the cesser of the trusts and transfer funds to the husband absolutely with power to raise and pay to the husband for business purposes 20,000*l.* with a final trust of unexhausted trust funds as the husband should by will appoint and in default in trust in moieties for his two brothers and their respective wives and issue according to their marriage settlements and lastly in trust for the last survivor of the husband and his two brothers.

By a deed of separation entered into by the husband and wife on February 23, 1926, the wife was to receive an allowance from the husband and his estate of 2000*l.* a year for life, of which any moneys received by her under the marriage settlement, the deed of covenant, or settlement of 1920 should be treated as part payment and satisfaction.

On the proceedings for variation the husband, the wife, the child and the trustees were represented, and the brothers of the husband and their trustees were directed to be served with notice and subsequently appeared.

The registrar, by his report dated November 6, 1929, submitted that the indenture of August 25, 1920, was a post-nuptial settlement within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192; that the brothers of the husband should have

1928

 PRINSEP
v.
PRINSEP.

1928
 PRINSEF
 v.
 PRINSEF.

their costs of appearing and attending the hearing provided for in spite of their interests being remote; and that the settlements should be varied in the following terms—namely, that a new settlement should be created giving the wife a life annuity of 2000*l.* and the child one of 500*l.* during the joint lives of the wife and the child (the latter to be applied under the statutory powers during her minority) and after the death of the wife giving the child an annuity of 1000*l.* for life and subject thereto on trust for the husband and child, her husband and children with an ultimate trust for the husband, the husband covenanting to make up any deficiency of income to meet the annuity of 500*l.* and after the death of the husband and the wife to make up for the child a provision of 2500*l.* per annum and that after the completion of this new settlement the husband should take the residue of the trust premises absolutely free from the original trusts with all consequential directions as to the settlements and the costs.

This variation was, so far as concerned the husband and the wife, an agreed one.

Noel Middleton (Cleveland-Stevens with him) for the wife. The power of appointment reserved to the wife qua wife in the settlement of August 25, 1920, and the provisions for wife and issue contained therein, are consistent only with the view that it is a settlement within the scope of the section. That section merely re-enacts the older legislation of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, and the question what instruments come within the definition of “settlement” is discussed in *Worsley v. Worsley* (1); *Bosworthick v. Bosworthick* (2); *Blood v. Blood* (3); *Hodgson Roberts v. Hodgson Roberts* (4); *Whitton v. Whitton* (5); *Loraine v. Loraine and Murphy* (6); and *Hargreaves v. Hargreaves*. (7)

(1) (1869) L. R. 1 P. & M. 648.

(2) [1927] P. 64, 68.

(3) [1902] P. 78, 82.

(4) [1906] P. 142.

(5) [1901] P. 348.

(6) [1912] P. 86, 222.

(7) [1926] P. 42, 44.

[HILL J. In this case the trustees can wholly defeat the settlement.]

1928

PRINSEP
v.
PRINSEP.

That was the actual point submitted in the case of *Janion v. Janion* (1) by the registrar's report, but the Court nevertheless held that there was jurisdiction to deal with the settlement.

Sir Thomas Hughes K.C. (*Colquhoun Dill* and *C.L. Beddington* with him) for the husband. The definition in the Supreme Court of Judicature (Consolidation) Act, s. 192, is a very wide one. A settlement in the usual sense connotes the interests in property of different persons in succession, but under this legislation there need not even be property. Covenants in a separation deed have been held to create a sufficient interest to support jurisdiction. *Worsley v. Worsley* (2); *Dormer v. Ward* (3); and *Bosworthick v. Bosworthick* (4) have the same effect. The document need only be an agreement to pay for another, and if marriage is a consideration it becomes an ante-nuptial settlement. The Act of 1859 shows an express intention not to limit the definition. *Hargreaves v. Hargreaves* (5) is distinguishable. To prove jurisdiction it is sufficient if after marriage either the other spouse or the children become interested, and the settlement cannot then escape the definition in s. 192. The amount for the wife accepted by the registrar—namely, 2000*l.*—is not excessive. The husband is left with nearly 4000*l.* per annum besides earnings. In the case of *Janion v. Janion* (1) the view taken by the report was that the settlement was one made by the husband on himself, but the Court dissented from that view and varied what appeared to be a spendthrift settlement, the trustees having power, as in the present case, to vary the trusts.

[HILL J. The difference between the cases seems to be that in *Janion v. Janion* (1) the husband was the settlor, while in this case the settlor is a third party.]

In *Stone v. Stone* (6) Lord Penzance seemed to have inclined to the view that the jurisdiction would have applied

- (1) Unreported. See note post, p. 237. (3) [1901] P. 20.
(4) [1927] P. 64, 68.
(2) L. R. 1 P. & M. 648. (5) [1926] P. 42, 44.
(6) (1864) 3 Sw. & Tr. 372.

1928
PRINSEP
v.
PRINSEP.

to money settled by a deed of separation had it not been expressly terminated by dissolution of marriage. The whole question really depends on the nexus between the parties.

Neville Gray for the infant. The wife and the child were both living at the time of the execution of the settlement, and it would be startling if they were not contemplated by it. It may be said, applying the principle of *Hargreaves v. Hargreaves* (1), that the settlement would never have been executed but for the existence of the wife and child. The motion is within s. 192, being for the application of property settled for the benefit of the wife and child. In providing for the exercise of the power of appointment the petitioner is referred to in the settlement as the wife of the respondent. The settlement obviously contemplates marriage; if it is not expressly intended to exclude the wife and child, it is a settlement within the Act.

Gavin Simonds K.C. (*Hon. V. Russell* with him) for the trustees of the settlement. The trust is one for the protection of the husband against himself, and if the contemplated order is made the effect will be to hand over to him 60,000*l.*, and the intention of the settlement will be defeated. As to the jurisdiction some line of demarcation must be drawn as to the meaning of a post-nuptial settlement. It must be in some degree related to the marriage, it must be not only after, but in consequence of, the marriage, the ratio decidendi in *Janion v. Janion*. (2) This is a settlement by a mother on her son and has nothing to do with his marriage. The settlor is merely anticipating the natural intentions of her will. The test is found in *Worsley v. Worsley*. (3) It is this. Is the settlement made on the parties in the characters of husband and wife? The language of that case is quoted by Lord Hanworth M.R. in *Bosworthick v. Bosworthick*. (4) These cases, along with *Hargreaves v. Hargreaves* (1), are the only relevant authorities. Moreover it is clear on the authorities that the Court will

(1) [1926] P. 42, 44.

(3) L. R. 1 P. & M. 648.

(2) Unreported. See note post,
p. 237.

(4) [1927] P. 64, 68.

not disturb the settlements, except for the benefit of innocent parties. The intention of the settlor should be observed as far as possible. The last thing intended in this case was to hand the property to the husband.

1928
PRINSEP
v.
PRINSEP.

Charles R. R. Romer for the trustees of the remaindermen. My clients are innocent parties, and the Court will not allow the handing over of property to their detriment: *Walpole v. Walpole* (1); *Noel v. Noel*. (2)

Sir Thomas Hughes and *Neville Gray* in reply.

Noel Middleton in reply. It is immaterial that the settlor is not one of the parties to the marriage: *Nepean v. Nepean*. (3)

Cur. adv. vult.

March 26. HILL J. Mr. and Mrs. Prinsep were married on August 8, 1912. There is one child of the marriage, born on May 26, 1913. Mrs. Prinsep obtained a decree nisi with custody of the child. The decree was made absolute on April 23, 1928. Mrs. Prinsep petitioned for variation of settlements. Mr. and Mrs. Prinsep and their legal advisers agreed upon a variation. The registrar has reported in favour of that variation. The effect, so far as Mrs. Prinsep and the child are concerned, is to transfer to new trustees for the benefit of Mrs. Prinsep and the child a large part of the securities comprised in an ante-nuptial settlement dated August 7, 1912, and a substantial part of the securities comprised in a settlement dated August 25, 1920.

Under the scheme an income of 2000*l.* will be secured to Mrs. Prinsep and an ample provision be made for the child. The total trust funds under the two settlements are of the value of 107,958*l.* The funds under the settlement of August 7, 1912, represent about 21,458*l.*, and the funds under the settlement of August 25, 1920, represent about 86,500*l.* The total income of the two funds is about 6301*l.*

It is thus apparent that 2000*l.* is a fair income to secure to Mrs. Prinsep. As to the child, every one agrees that the scheme makes a fitting provision for the child and that it is in her interest that it should be sanctioned. The difficulty

(1) [1901] P. 196.

(2) (1885) 10 P. D. 179, 182.

(3) [1925] P. 97.

1929
PRINSEP
v.
PRINSEP,
Hill J.

in the matter arises from the fact that by the scheme to which Mr. Prinsep agrees, the balance of the trust funds under the two settlements are to be transferred to Mr. Prinsep and the trusts of these two settlements come to an end. Under the scheme there will be transferred to the new trustees for Mrs. Prinsep and the child out of the funds settled on August 7, 1912, securities valued at 20,857*l.*, and out of the funds settled on August 25, 1920, securities valued at 24,741*l.* The total will thus be 45,598*l.*, and that will leave to be transferred to Mr. Prinsep securities valued at 62,360*l.* The trustees of the settlement of August 25, 1920, oppose. There is a further opposition by two brothers or trustees for two brothers of Mr. Prinsep. Those who object to the report contend (1.) that the Court has no powers to deal with the settlement of August 25, 1920, at all, and (2.) that in any case it ought not to deal with it by handing over to Mr. Prinsep absolutely the balance of the settled funds, and that that at least ought to be left subject to the trusts of the settlement of August 25, 1920, except, I suppose, so far as Mrs. Prinsep and the child are concerned.

The main point in issue is whether the settlement of August 25, 1920, is a "post-nuptial settlement on the parties" within the meaning of s. 192 of the Judicature Act, 1925. Is it upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state. Is the settlement of August 25, 1920, of that character? It was made at a time when there was a husband, Mr. Prinsep, and there was a wife, Mrs. Prinsep, and there was also a child of the marriage. In terms, it has in contemplation Mr. Prinsep, whom it designates "principal beneficiary," but it also has in contemplation

his then wife, Mrs. Prinsep, and any future wife and his child and any future children. The trustees are, however, given a very wide discretion. Clause 3 deals with income. During the lifetime of Mr. Prinsep it is to be applied for the benefit of all or any one of the following, Mr. Prinsep, his issue by any marriage and any wife of his, as the trustees in their absolute discretion think fit; and if no wife or issue is living then they have the like discretion as between Mr. Prinsep and the persons who would be entitled if he were dead.

This leaves it to the trustees to select as between Mr. Prinsep and his wife for the time being, who was at the time and who, but for the decree absolute, would still be Mrs. Prinsep, and his children, and to decide who is to have the income. But they are as free to pay it all to the wife or to a child as to Mr. Prinsep. Unless the absolute discretion of the trustees makes all the difference, the trust is as much for the benefit of Mrs. Prinsep in her character as wife as it is for Mr. Prinsep, and as much for the benefit of the child of the marriage as it is for the benefit of either of the parties.

By clause 5 Mr. Prinsep may appoint the income to any wife who may survive him for her life, i.e., if the marriage were still subsisting he might appoint to Mrs. Prinsep in the character of wife. As to capital, during the lifetime of Mr. Prinsep the trustees have power by clause 8 to pay to him out of the trust funds for the purposes of business sums not exceeding 20,000*l.*, and by clause 7 they may at their absolute discretion, after Mr. Prinsep is thirty-five years old (and he is), declare the trusts at an end and transfer the trust funds to Mr. Prinsep.

As to the capital at the death of Mr. Prinsep, he has a power of appointment first among his children by any marriage, secondly his brothers, and thirdly the issue of his brothers; but failing an appointment by him then Mrs. Prinsep (not any wife, but Mrs. Prinsep, the petitioner) has after his death, a power of appointment providing that any issue of Mr. Prinsep is in existence. In default of any appointment by either,

1929

 PRINSEP
v.
 PRINSEP.
 HILL J.

1929
PRINSEP
v.
PRINSEP.
HILL J.

the capital goes to the child or children of Mr. Prinsep on their attaining twenty-one years or marrying. There are a number of other provisions. But those to which I have referred are sufficient to show that the dissolution of the marriage makes it impossible to carry out the settlement in the way which it contemplates, and to greatly affect the interests of Mrs. Prinsep. Unless the absolute discretion of the trustees as to the application of the income as between husband, wife and child and the absolute discretion of Mr. Prinsep as to whether he should appoint the income to Mrs. Prinsep as his widow, prevent me from regarding the settlement as a settlement on the spouses as spouses, it seems to me to be clear that this is a settlement upon them in the character of spouses. On this question, the case is governed by the decision of the President in the case of *Janion v. Janion* (1) to which I was referred. I have since been supplied with a transcript of the judgment. The settlement in *Janion* contained clauses similar to clauses 3 and 5 and 7 in the present settlement. I find this in the President's judgment: "The deed witnesses that 'in consideration of his natural love and affection for his wife he as settlor' makes the assignment in question, and he assigned the various properties in such a mode that he could not revoke the assignment without the consent of the Public Trustee, and that during his life the income of the property included in the assignment was to be applied 'for the maintenance, support or otherwise for the benefit of [himself] his wife and issue for the time being in existence and any persons or person who would, if he were actually dead intestate, be entitled to the trust funds or to the income thereof' and the income was to be applied for the purpose as the Public Trustee in his absolute discretion should think fit, and after the death of the assignor and subject to the life or other interest of his wife under a power of appointment which he had reserved and which he might exercise in her favour, the property was to be held in trust 'for all or any one or more exclusively, or the other or others of the child, children or more remote issue of the assignor

(1) Unreported. See note post, p. 237.

by any marriage in such shares as he should by will or codicil appoint and in default of appointment in trust for those children in equal shares.' There was also a proviso that, with the consent of the Public Trustee, the assignor might revoke this deed, and he might revoke it as to part of the funds, or as to the whole of the funds." In *Janion v. Janion*, as here, it was contended, as appears from the registrar's report, that the settlement was not within s. 192—"that the wife was not a party to the deed, that the trustee has an absolute unfettered discretion as to the disposition of the funds, and that the respondent has a power of revocation with the consent of the trustee." The registrar reported that he agreed with the contention. But the President rejected that contention and varied the settlement.

I follow that decision, and I agree with it. Nor can I find anything in the present case to make that decision inapplicable. It is true that the fund in *Janion v. Janion* came from the husband. Here it came from Mr. Prinsep's mother—though in a sense Mr. Prinsep contributed part of it, for in consideration of the transfer to the trustees of the settled funds he surrendered a covenant by his mother dated September 1, 1917, to pay him 2000*l.* a year during the joint lives of herself and her son. But whether a settlement is within s. 192 does not depend on who is the settlor. In many ante-nuptial settlements, neither the husband nor the wife are themselves the settlors. In the present case Mr. Prinsep's mother was the settlor under the marriage settlement of August 7, 1912, and no one questions that that was a settlement within s. 192. In *Janion v. Janion* it is true that the settlement recited that the husband was desirous of making a provision for his wife and issue, while in the present settlement the consideration is stated to be the natural love and affection of the settlor for Mr. Prinsep and the release by Mr. Prinsep of the annuity. But whether a settlement is within s. 192 must depend on what it effects. If, in fact, it is a settlement on either husband or wife, or both in the character of husband or wife, it is wholly immaterial that it is prompted and stated to be prompted by affection only for one of them.

1929

 PRINSEP
v.
 PRINSEP.
 HILL J.

1929

PRINSEP
v.
PRINSEP.
Hill J.

On the question whether a settlement is a settlement within s. 192, the motive of the settlor seems to me immaterial, except so far as it is given effect to by the terms of the deed. The result of these considerations is that the Court has power to vary not only the marriage settlement of August 7, 1912, but also the settlement of August 25, 1920.

The next question is whether they ought to be varied, as in the scheme approved by the report. So far as the report and the scheme relate to Mrs. Prinsep and the child, I have no doubt that it should be approved in all its details. In arriving at that conclusion I pay no regard to the consent of Mr. Prinsep. Apart altogether from consent, it is a proper variation, so far as Mr. Prinsep, Mrs. Prinsep and the child are concerned.

Nor do I think that it ought not to be made because of the interest of the brothers, or rather the trustees of the brothers. That interest is created by clause 9, and only comes into effect if no child of Mr. Prinsep attains a vested interest and Mr. Prinsep makes no appointment. The child is now nearly sixteen years old. Mr. Prinsep has re-married and may have other children, and it is extremely unlikely that he would not exercise his powers of appointment if the settlement of August 25, 1920, were left untouched, or would not, if the child were to die unmarried before attaining twenty-one years, deal with the trust funds by will. The interest of the brothers is too remote to allow it to hamper the Court in making a proper provision for Mrs. Prinsep and the child.

There remains the more difficult question whether the balance of the funds under the two settlements, amounting to some 62,000*l.* or 63,000*l.*, should be taken out of the trusts of the settlements and handed over to Mr. Prinsep. The main object of variation is to make proper provision for the injured spouse and the children of the marriage. And *prima facie*, settlements ought not to be interfered with further than is necessary for that purpose. But the Court which has annulled the marriage must not only protect the injured party, but also be fair to the wrongdoing party. In *Janion v. Janion* the Court, after making provision for the wife, directed that

the balance be transferred free from the trust to the husband, but there the whole fund had come from the husband. The present case is different, but still Mr. Prinsep gave up the annuity of 2000*l.* which he would have otherwise enjoyed during the life of his mother. It is further the fact that Mr. Prinsep has married again. The trustees take the view that Mr. Prinsep's mother made the settlement of August 25, 1920, in the form it took, in order to protect Mr. Prinsep from his own extravagance and to prevent the trust funds being foolishly wasted. All these matters deserve consideration. In my view, the proper course will be to resettlement the rest, in such a way as the trustees may approve, so as to carry out the intentions of the original settlement, but upon the basis that the petitioner and her child no longer have any interest therein. Some such resettlement upon a second marriage of Mr. Prinsep was contemplated by the settlement of August 25, 1920. Sir Thomas Hughes intimated that if the scheme was not accepted as a whole, he had proposals to make; but I think it well that Mr. Prinsep and the trustees should see what can be agreed, and the matter can be mentioned again. I think it would be far better that it should be arrived at by some agreement, and it can be mentioned again if there is no agreement, but I think there will be.

Costs of the remaindermen as between solicitor and client to be paid by respondent, and the respondent being ultimately responsible for the costs of the petitioner and the infant, the costs of the trustees to stand over.

Solicitors for the petitioner : *Hunters.*

Solicitors for the respondent : *Theodore Goddard & Co.*

Solicitors for the trustees : *Radcliffes & Hood, St. Barbe Sladen & Wing.*

Solicitors for the infant : *Beachcroft, Hay & Ledward.*

Solicitors for brothers of respondent : *Radcliffes & Hood, St. Barbe Sladen & Wing.*

NOTE.

In the case of *Janion v. Janion* the wife obtained a decree absolute dissolving her marriage on the ground of the adultery of her husband, and there was

1929

PRINSEP
v.
PRINSEP.

Hill J.

1929

Note to
PRINSEP
v.
PRINSEP.

one child, custody of whom was given to her. In due course she filed a petition to vary a post-nuptial settlement. The parties had been married on October 3, 1914, during the minority of the husband. On April 1, 1915, the husband, who had then attained his majority, executed the settlement covering property producing an income of 2700*l.* or thereabouts, to which he then became entitled. The settlement recited that the settlor was desirous of making a provision for his wife and issue in consideration of his natural love and affection for his wife. The trusts of the settlement were during the life of the settlor to apply the income for the maintenance support or otherwise for the benefit of all or any one or more exclusively of the other or others of the settlor his wife and issue of his for the time being in existence and any person or persons who would if he were actually dead intestate be entitled to the trust fund or to the income thereof as the trustee (the Public Trustee) in his absolute discretion should think fit and after the death of the settlor and subject to the life or other interest of any wife of his under a power for that purpose thereafter contained the capital and income were to be held in trust for all or any one or more exclusively of the other or others of the child children or more remote issue of the settlor by any marriage in such shares and in such manner generally as the settlor should by will or codicil appoint and in default of appointment in trust for all or any of his children or child by any marriage who should attain the age of twenty-one or being female marry under that age.

It was provided that the settlor might from time to time or at any time by will or codicil appoint to or in favour of any wife who might survive him during the residue of her life or any less period all or any part of the annual income of the trust fund and also that the settlor might from time to time or at any time by deed revocable or irrevocable with the consent in writing of the trustee revoke all or any of the trusts and might direct that any part of the fund to which such revocation extended should be held in trust for the settlor or otherwise as he might think proper.

The wife asked that one-third of the income of the settled property should be paid to her for life and that the settlor's power of revocation be extinguished, and further that the settlor's power to appoint to a future wife or children should be extinguished in the case of any future wife that he might marry in this wife's lifetime and the children of such a marriage. It was further asked on behalf of the child of the marriage that 250*l.* per annum should be paid for his maintenance and education till he attained twenty-one, and thereafter that 300*l.* per annum should be paid to him during this wife's lifetime, and that half the settled fund should be resettled on him on this wife's death. The registrar, to whom the petition was referred, reported (a) that there was no jurisdiction, the settlement not coming within the Judicature (Consolidation) Act, 1925, s. 192; and (b) that if there was jurisdiction the Court ought not to fetter the discretion of the trustee.

On this report coming on for confirmation Lord Merrivale P. delivered a judgment on November 29, 1926, in the course of which, after dealing with the facts and reciting the trusts of the settlement, as set out in the judgment in the present case, he proceeded to discuss the question of jurisdiction as follows: "Counsel for the husband said that this settlement was what is called a spendthrift settlement intended to prevent an impulsive young man from making away with his property, and it is said that that being manifest

or appearing upon evidence to be the motive which operated to induce that settlement, the Court ought not to deal with an application to vary it.

"Then the question comes to be: Is this such a settlement as is in the contemplation of the Legislature in these enactments? I thought at first that it was contended that it was not a settlement, but it is perfectly clear now and is confessedly a fact that it is a settlement, and when the document is produced it proves to have been treated by those who were concerned in framing it as a settlement. It is endorsed on the back as a settlement. In the operative words to which I have referred it purports to settle, and in the proper phrases does proceed to settle the funds which are the subject of the assignment. It is said that I ought to have regard to the intent with which the transaction was effected. The respondent has contended, and he has filed affidavits to the effect, that he did it without any full appreciation upon strong pressure by his trustees and in order to protect himself. An assignment of property to a trustee in which the *cestuis que trustent* are the wife, then in being a future wife if there be one and any child of the marriage as well as the husband and father of any children extends not only to but beyond the lifetime of the husband. These being the trusts, I find it impossible to say that this is not a settlement which is within the provisions in the successive statutes and placed by those provisions under the control of the Court. It is the effect which must be regarded. It is the interest of the wife and child or any wife or any child or children, and as to those the Legislature, as I understand, intended to protect them from being impoverished by reason that a decree of divorce had become necessary. In point of time of course being a settlement it is a post-nuptial settlement, and it is common knowledge now that the Court has not jurisdiction to vary the terms of settlements not made by the parties to the marriage or between them, or with any intent, which affects their nuptial relation, made by third parties. The case of *Loraine v. Loraine* (1) is of perfectly clear operation. It was a case where the guilty wife in a divorce suit had been entitled to benefits under the will of her father, and it had been supposed in this Division that the Court might deprive her of those benefits. They were not benefits within the ambit that the Legislature had given to this Court for dealing with settlements. The husband had had nothing to do with the providing of them. The relation of the parties had not entered into the terms under which they were provided.

"The transaction in *Loraine v. Loraine* (1) was a transaction, as I may say, foreign to the marriage. Here the marriage is of the essence of the transaction. The interests of the parties, the wife and child or children, are placed under the protection of a public officer. It is impossible to my mind to successfully contend that this is not a settlement within the powers created under the Act of 1859 extended later by another Matrimonial Causes Act and reaffirmed in the Judicature (Consolidation) Act, 1925."

The learned President proceeded to direct the variation of the settlement.

(1) [1912] P. 222.

1929

Note to
PRINSEP
v.
PRINSEP.

R. M. M.

1928

[IN THE CONSISTORY COURT OF ELY.]

Oct. 8, 20.

HAUXTON PAROCHIAL CHURCH COUNCIL v.
STEVENS.

Ecclesiastical Law—Repair of Chancel of Parish Church—Liability of Impropiator—No Notice in Conveyance.

The impropiator of an impropriate rectory in the receipt of the profits thereof is personally liable for the repair of the chancel of the parish church although at the time of the conveyance to him of the lands forming *part of the rectory he had no notice of the liability.

CAUSE of office at the promotion of the churchwardens and parochial church council of Hauxton against the defendant J. H. Stevens as impropiator of certain lands, claiming that he was liable for repairs to the chancel of Hauxton Parish Church.

The claim came on for hearing before the Chancellor of the Diocese of Ely, Mr. Kenneth M. Macmorran. The following statement of facts is taken from the written judgment:

“The facts of the case are, in the main, not disputed. So far as there is a dispute I find them to be as follows: Hauxton and Newton are contiguous parishes in this diocese, the benefices in which have been united for hundreds of years, under the name of Hauxton-with-Newton or Hauxton-cum-Newton. The chancel of Hauxton Church is in serious need of repair, and an estimate procured two years ago put the cost of necessary repairs at about 30*l*. This figure would probably be exceeded if a new estimate were now obtained. At the time of the estimate the defendant, Mr. Stevens, was asked to carry out the repairs, but he then refused and still refuses to do so.

In 1798 there was passed an Inclosure Act (38 Geo. 3, private Act, Number 55), the preamble to which recites that the Dean and Chapter of Ely are the owners of the great tithes arising and renewing from certain parts of land lying in the parishes of Harston, Hauxton, Little Shelford and Newton, and are lords of the manor of Newton-with-Hauxton, and are impropiators of the impropriate rectory of

Newton-with-Hauxton and in right thereof are entitled to the rectorial tithes. The Act provided that commissioners appointed by the Act were to allot to the impropriators such lands as should be a full equivalent and compensation for the said tithes, and also to make an allotment in lieu of tithes and other payments due to the impropriators. Upon the allotments being awarded the tithes were to be extinguished, and the lands so allotted were to enure to the same uses and subject to the same charges, services and incumbrances. The Act in effect took away the tithe and the right to receive tithe, and substituted land. The award under the Act was made in 1802, and by it were allotted to the Dean and Chapter as impropriators three allotments lying in Hollick Meadow, Fen Meadow and Pessils Field, and, as lords of the manor, an allotment lying in Church Field. In 1863 the Dean and Chapter granted to one Henry Hurrell a lease for twenty-one years of the allotments above referred to, other than that lying in Fen Meadow. I may mention that the Fen Meadow allotment was relatively a small proportion of the total acreage under the award. This lease contains a covenant binding on the lessee to repair the chancel of Hauxton Church. The next steps in this complicated history are two Orders in Council, one of which, in 1869, transferred the rectory of Hauxton with its endowments to the Ecclesiastical Commissioners, and the other, in 1870, authorized the commissioners to sell. The commissioners did sell, in 1871, to the same Henry Hurrell as had been the lessee of the three allotments since 1863. The land so purchased amounted to 48 a. 2 r. and 13 p., and it is interesting to note that it comprised all the land originally allotted except the Fen Meadow allotment. The conveyance is subject to a perpetual covenant to repair the chancel of Hauxton Church, and the payment to the vicar of 4*l.* 1*s.* 8*d.* in tithe commutation rentcharge. Lastly, in 1916, one Arthur Hurrell, to whom had descended the estate of his father, Henry Hurrell, sold to Mr. Stevens, the present defendant, all the property comprised in the conveyance of 1871, with a certain small addition. The indenture recites that Arthur Hurrell is seised

1928

HAUXTON
PAROCHIAL
CHURCH
COUNCIL
v.
STEVENS.

1928
HAUXTON
PAROCHIAL
CHURCH
COUNCIL
v.
STEVENS.

in fee simple free from incumbrances, and no reference is made to the conveyance of 1871. It is here that a dispute of fact arises between the parties. Mr. Hurrell, who gave evidence before me, stated that he told Mr. Stevens about the liability in respect of the chancel. Mr. Stevens, on the other hand, denies this, and says that he first heard of the claim in 1922. [The learned Chancellor then discussed the evidence and continued:] While, therefore, making no imputation against Mr. Stevens' veracity, I am prepared to hold that he had notice of the liability when he bought in 1916."

F. H. L. Errington for the council. The defendant, as impropiator of the inappropriate rectory of Hauxton, is liable for the repair of the chancel: *Serjeant Davies' Case*. (1) This liability does not constitute a charge but is a personal duty: *Walwyn v. Awberry*. (2) By rectory or parsonage is meant the sum total of its endowments: *In re The Alms Corn Charity*. (3) The mere fact that the freehold of the chancel is in the rector does not impose the liability, because the freehold of the whole church is in him; his liability has its origin in custom: Gibson's Codex, vol. i., p. 223; Phillimore's Ecclesiastical Law, 2nd ed., vol. ii., p. 1416; and *Griffin v. Dighton*. (4) The reference to the freehold in the judgment in *Morley v. Leacroft* (5) is a slip. The liability is imposed because the rector has the profits and should therefore have the burden: *Griffin v. Dighton* (4); *Smallbones v. Edney* (6); Watson's Clergyman's Law, p. 394; Ayliffe's Parergon, p. 457; and Phillimore's Ecclesiastical Law, 2nd ed., vol. ii., p. 1415; and if the profits are divided amongst several persons, all those persons are liable for the repair and must settle the proportions among themselves: Burn's Ecclesiastical Law, 9th ed., vol. i., p. 352; Rogers' Ecclesiastical Law, 2nd ed., p. 161. It is true that the rectory was not conveyed by the conveyance of 1871, and the defendant alleges that the persons then conveying are the lay rector and as such are liable. But all that he can

(1) (1621) 2 Rolle, 211.

(2) (1676) 2 Mod. 254, 258.

(3) [1901] 2 Ch. 750, 758.

(4) (1864) 5 B. & S. 93.

(5) [1896] P. 92, 93.

(6) (1870) L. R. 3 P. C. 444.

have is the freehold of the rectory, while the defendant has the profits. If the defendant's contention is right it would be easy to get rid of the liability to repair and throw it on the parishioners—namely, by selling the property of the rectory to A., and the rectory itself to B. A. could then urge that he was not lay rector and B. could say that he had no profits from the rectory, and there would be no necessity for the provisions of s. 52 of the Ecclesiastical Dilapidations Measure, 1923 (14 & 15 Geo. 5, No. 3). The fact that the respondent had not notice cannot affect his personal liability. In fact, as he had complied with other obligations imposed by the conveyance of 1871 it is clear that he must have had notice of its contents.

[*Walwyn v. Awberry* (1); *Bishop of Ely v. Gibbons* (2); *Slowman v. Churchwardens of Longrevil* (3); and *Lanchbury v. Bode* (4) were also referred to.]

G. A. Wootten (solicitor) for the respondent. The respondent had no notice of this liability when he purchased the land, and the conveyance recited that the land was free from incumbrances. The respondent is not lay rector and has no right to a seat in the chancel. Moreover he pays tithe rentcharge and cannot therefore be called upon to pay for these repairs.

1928. Oct. 20. THE CHANCELLOR (MR. KENNETH M. MACMORRAN). In this case the office of the judge of this Court is promoted at the instance of the parochial church council of Hauxton against John Herbert Stevens, who is charged by them with the liability to repair the chancel of the parish church, which liability he repudiates. [The learned Chancellor stated the facts as above set out and continued:]

On this finding, I believe that the only defence which is seriously raised breaks down. But in view of Mr. Errington's interesting argument I think I should also deal with this case apart from the question of notice. In *Serjeant Davies' Case* (5) it is stated that he who has the

1928

HAUXTON
PAROCHIAL
CHURCH
COUNCIL
v.
STEVENS.

(1) 2 Mod. 254.

(3) (1670) 2 Keb. 742.

(2) (1833) 4 Hagg. 156.

(4) [1898] 2 Ch. 120.

(5) 2 Rolle, 211.

1928 impropriation of the rectory or parsonage ought to repair
 HAUXTON the chancel, and ought to contribute to the repair of the
 PAROCHIAL] church. In *Walwyn v. Awberry* (1) Atkins J. said (2) it
 CHURCH
 COUNCIL was agreed by all, that an impropriator is chargeable with
 v.
 STEVENS. the repairs of the chancel; but the charge was not personal
 The Chancellor. but in regard of the profits of the impropriation; and to this
 may be added the observations of Mellish L.J. in *Smallbones v.*
 Edney (3), where he explains the liability of a tithe owner.

It seems, therefore, clear on the above mentioned authorities that the liability in this case attaches to the profits accruing to the benefice (by which I mean the impropriated benefice), and the person who receives the profits becomes by virtue of such receipt liable for the repair of the chancel. On this aspect of the case, notice of the liability is not material in the sense that a purchaser can escape liability merely by pleading ignorance of the liability at the time of his purchase. The question of notice thus becomes a matter between Mr. Stevens and his vendor.

The result, then, appears to me to be capable of enunciation as follows: I find as a fact that Mr. Stevens is, on the true construction of the relevant documents, the impropriator of the impropriate rectory or a substantial part thereof, and is the owner of lands forming the greater part of the rectory, and is in the receipt of the rents and profits of such lands. I further find that when he purchased the lands in 1916 he had notice of the liability to repair the chancel of Hauxton Church attaching to the rents and profits of the lands so purchased, though I also hold that notice was not material for the purposes of this case. In these circumstances I have no alternative but to pronounce that Mr. Stevens has herein offended against the law and that he be and hereby is admonished forthwith to put the chancel of Hauxton Church into proper repair and condition. Mr. Stevens must further pay the costs of these proceedings.

Solicitors for plaintiffs: *Crawley, Arnold & Co.*

Solicitors for defendant: *Wootten & Wallis, Cambridge.*

(1) 2 Mod. 254.

(2) 2 Mod. 258.

(3) (1870) L. R. 3 P. C. 444, 450.

W. L. L. B.

VIGON v. VIGON AND KUTTNER.

C. A.

1929

April 19.

Divorce—Practice—Custody of Child—Previous Order of Court of Summary Jurisdiction—Variation of Order—Guardianship of Infants Acts, 1886 and 1925 (49 & 50 Vict. c. 27 and 15 & 16 Geo. 5, c. 45).

APPEAL from a decision of Bateson J. (1)

On September 15, 1927, the wife obtained from a Court of summary jurisdiction an order under the Guardianship of Infants Acts, 1886 and 1925, for the custody of the child of the marriage, a boy born on April 1, 1926. On December 12, 1928, the husband was granted a decree nisi for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent. The petition contained a prayer for the custody of the child, but on pronouncing the decree nisi Bateson J. adjourned the question of granting custody to the husband for argument, having regard to the fact that the magistrate's order in favour of the wife was still in force. On December 21, 1928, the matter again came before Bateson J., who made an order giving the custody of the child to the petitioner. In making the order his Lordship said that he thought he could vary the order of the Court of summary jurisdiction under the Act of 1886, s. 5, but he did not wish to do so without that Court having the opportunity of considering the matter. He proposed therefore to direct that the portion of the decree dealing with custody should not be drawn up for one month. That would give an opportunity of informing the Court of summary jurisdiction that he had found the wife guilty of adultery, and that he thought that the husband should have the custody of the child.

The wife appealed. The appeal was heard on April 19, 1929.

S. R. Sidebottom for the wife.

H. Durley Grazebrook for the husband.

(1) Ante, p. 157.

C. A. The Court (LORD HANWORTH M.R., LAWRENCE and
 1929 SANKEY L.JJ.) were of opinion that in the present state
 VIGON of the evidence they ought not to decide the question of
 v. jurisdiction dealt with in the Court below. The better
 VIGON AND course was to set aside the order of Bateson J. (which in
 KUTTNER. the course of argument the Master of the Rolls described as
 an inchoate order) and give liberty to apply to Bateson J.
 further as to custody.

Solicitor for the wife : *H. E. Greville.*

Solicitors for the husband : *Romain & Romain.*

W. I. C.

THE PALEMBANG.

1928
 Nov. 20, 21,
 22.
 1929
 Jan. 18 ;
 March 21 ;
 April 18, 19,
 22 ;
 May 15.

Shipping—Collision—Sound Signals in Fog—"Under Way"—*Vessel turning in the River—Port of London River Bye-laws, 1914–1926, by-laws 5 and 28 (e).*

Under by-law 28 (e) of the Port of London River Bye-laws, 1914–1926, in fog, "a steam vessel under way about to turn and whilst turning round shall sound at intervals of not more than two minutes four short blasts in rapid succession, followed, if turning with her head to . . . port by two short blasts."

By-law 5 provides that "in these Bye-laws . . . unless there be something in the subject or context repugnant to such construction . . . the expression 'under way' when used in relation to a vessel means when she is not at anchor . . . and includes a vessel dropping up or down the river with her anchor on the ground."

In order to come to anchor on account of fog the plaintiffs' vessel *Pakeha*, bound up river on the flood tide, sounded the appropriate signal under by-law 28 (e), hard-a-starboarded her helm, and put her engines full speed astern. When she had swung two or three points the anchor was let go with thirty fathoms of chain and was reported to be holding. Her navigation lights were then switched off, the anchor lights switched on and the bell commenced to be rung for fog. The engines had then to be worked half ahead and full speed ahead for about a minute and a half to avoid a small vessel at anchor, and were then put full speed astern for about a minute and then stopped. About ten minutes after the anchor had been let go, and when the *Pakeha* had nearly swung head to tide, she was run into by the defendants' steamship.

The defendants alleged (inter alia) that the *Pakeha* was a vessel under way and turning in the river and required, therefore, to continue sounding the signal of four short blasts followed by two :—

Held, following the criterion laid down in *The Esk* (1869) L. R. 2 A. & E. 350, that as the *Pakeha* was "holden by and under the control" of

her anchor during all the time in question, she was not "under way," and was right in ringing her bell, the appropriate signal for a vessel at anchor in a fog.

1928

THE
PALEMBANG.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Pakeha*; the defendants and counterclaimants were the owners of the steamship *Palembang*. The collision took place in Sea Reach, River Thames, during a dense fog. The tide was flood with the force of about two knots, and there was no material wind. The *Pakeha*, which was bound up river, was swinging to her anchor to get head on tide and the *Palembang* was proceeding slowly up the river. The case is only reported on the question whether the *Pakeha* was to be regarded as a vessel under way and turning within the meaning of by-law 28 (e) of the Port of London River Bye-laws, 1914-1926. The movements of the *Pakeha* and the material portions of the by-laws sufficiently appear from the headnote and are fully set out in the judgment.

Langton K.C. and *Alfred Bucknill* for the plaintiffs. The *Pakeha* was not "under way" within the meaning of by-law 5 of the Port of London River Bye-laws; she was "holden by and under the control of her anchor," the criterion adopted by Sir Robert Phillimore in *The Esk* (1); see also *The Romance*. (2) She was therefore neither "under way" nor "turning round," and by-law 28 (e) did not apply to her. Turning round is not the same thing as swinging to anchor, otherwise at tide time when vessels swung they would have to sound turning signals, a practice which has never been suggested. There is no charge against the *Pakeha* in the defence that she was improperly ringing her bell although not at anchor, but, if the defendants' contentions are right, that allegation, and the further one that she had up anchor lights instead of under way lights, should have been included in the charges.

[Reference was also made to *The Dagmar*. (3)]

(1) L. R. 2 A. & E. 350.

(2) [1901] P. 15.

(3) [1929] W. N. 78.

1928 *Stephens K.C.* and *Carpmael* for the defendants. The
THE
PALEMBANG. *Pakeha* was a vessel "under way" until she was riding to
her anchor. In *The Wega* (1) *Bruce J.* said, in connection
with the "not under command" signal, that the danger of a
vessel turning could not be said to have passed until she
"had swung to her anchor." The *Pakeha* was still making
some way and blocking a large part of the waterway in a dense
fog and, apart from the by-laws, good seamanship required
her to continue sounding the turning signal. The *Palembang*
was suddenly enveloped in the fog and was not guilty of any
negligence: see *The Nador*. (2)

Bucknill replied.

May 15. THE PRESIDENT (LORD MERRIVALE) read the
following judgment: The collision in question took place
on May 26, 1928, at a few minutes before three in the morning
in dense fog in Sea Reach of the Thames at a point about
twelve cables above the Chapman Light. The plaintiffs' vessel,
the *Pakeha*, a steel twin screw steamship of 7889 tons gross
register, 477 feet long, with quadruple reciprocating engines
of 854 horse-power, and manned by a crew of eighty-three
hands, had come to an anchor in the fog in course of her
voyage with general cargo from Wellington, New Zealand,
to London. The defendants' steamship, the *Palembang*, a
vessel of Dutch register, of 7051 tons gross, 445 feet long,
with triple expansion engines of 500 horse-power nominal,
came into Sea Reach in course of her voyage, part laden,
from Dunkirk to London. Each vessel had an experienced
Thames pilot on the bridge at all material times, and both
were adequately manned and equipped.

One broad allegation on the part of the *Pakeha* was that
in steaming to the point in question on her course, and in
coming to a down river heading, she had been enveloped
in dense fog for more than a quarter of an hour before the
collision. On the other hand, the defendants alleged that
at the time when they had been proceeding up river with
bare steerage way, for half an hour hearing for signals ahead

(1) [1895] P. 156.

(2) [1910] P. 300.

but not prevented from safe navigation, they found the *Palembang* "suddenly enveloped in a dense bank of fog" just before the collision. Each vessel blamed the other in respect of action taken on board when both were in the fog. They were agreed, however, that a serious casualty took place presently after the vessels respectively became aware of their mutual proximity, the stem of the *Pakeha* and the starboard bow of the *Palembang* coming into collision with heavy resultant damage to the *Palembang* and some damage to the *Pakeha*.

1929

 THE
 PALEMBANG.

 The President.

The plaintiffs' main case was that the *Pakeha*, being at anchor, was run into by the *Palembang*, negligently brought into and navigated in fog at excessive speed. The plaintiffs also alleged improper starboarding of the *Palembang* to cross ahead of the *Pakeha*, and that when the *Palembang* was close to the *Pakeha* she dropped her starboard anchor bringing her head to port so that the *Palembang* fouled the anchor chain of the *Pakeha* and broke her adrift.

The defendants, while traversing the *Pakeha's* allegation as to the navigation of the *Palembang*, denied that the *Pakeha* was at anchor, and further said that if at anchor she was not showing two riding lights, having none aft. They contended also that during the fifteen minutes before the collision, the *Pakeha* had been a vessel under way about to turn or in course of turning round, bound by by-law 28 (e) of the Port of London River Bye-laws, 1914-26, to sound four blasts and two at intervals of not more than two minutes, and that she had failed to comply with the by-law. Beyond this it was complained that when the vessels were in imminent danger of collision the *Pakeha* had not taken action to get out of the way by slacking her cable and using her engines to go astern. It was said indeed that, on the contrary, she had come ahead towards the *Palembang* and so into collision with her.

The defendants' charge that the *Pakeha* did not display two anchor lights I may deal with at once, by saying that I find both the lights to have been duly lit and to have been burning at all material times.

1929

THE
PALEMBANG.
The President.

The main controversy on the facts was that raised by the defendants' allegation that their vessel in course of her voyage up river in Sea Reach was enveloped suddenly by the dense bank of fog in which the collision occurred. Asserting this to be so, Mr. Stephens submitted that those on board the *Palembang* had no warning of the state of things into which the vessel was proceeding; that they navigated their ship with due care when they found themselves in difficulties as to visibility; and that, therefore, they could not be found guilty of negligence so as to give the plaintiffs cause of action for damage due to the collision.

The case was said to be on all fours with that of *The Nador* (1), where—to cite from the judgment—the circumstances afforded no sort of warning that (the *Nador*) “was approaching a fog of the density which in fact appears to have been the case.” Those in charge “entered the fog suddenly and then, . . . when they . . . realised that the only thing to be done was to bring the ship to an anchor, . . . took the proper steps to do so.” Some discussion arose at the hearing here upon the fact that the defendants in the case of *The Nador* (1) formulated in their defence a plea of inevitable accident. This, however, is a matter of form only. The defendants there, as here, brought before the Court the facts on which they relied to show that in navigating in a fog, and coming into collision, they were not guilty of negligence. Negligence, or its absence, is the matter material for determination, and the facts of the case as to fog are, therefore, of vital importance.

There is cogent evidence on the part of the plaintiffs that for, at any rate, half an hour before the collision there was from just above the Chapman Light to the place of the collision intermittent fog which made it imprudent to advance up river at any substantial speed. Two vessels, the *Woodcote* and the *Bazalgette*, were brought to anchor because of fog, a quarter of a mile down river from the place of collision, a good part of three-quarters of an hour before the *Pakeha* let go her anchor. Each of those was from that time

(1) [1909] P. 300, 303.

sounding her bell for fog, and both the *Pakeha* and the *Palembang* steamed past them. "Sometimes," said the master of the *Woodcote*, "you could see ships, sometimes you couldn't." Up river of the *Woodcote* and the *Bazalgette* were numerous other vessels sounding during this period in like manner.

1929

THE
PALEMBANG.
—
The President.

The defendants' pilot said there were no less than thirty-five ships sounding their bells in the upper part of the Reach during the night. Most, if not all, of those vessels had come to anchor before either the *Pakeha* or the *Palembang* passed up. On the other hand, the *Pakeha* went ahead with precautions till about half-past two, and with her engines at dead slow from 2.33 until 2.45, although fog signals, including bells, had been heard higher in the Reach. The steam tug *Betty* passed the Chapman at nearly the same time as the *Pakeha* and anchored a quarter of a mile or more below her, and the *Betty's* master says that half a minute before the *Palembang* passed the *Betty* the weather was more clear down river, and that there then came on a sudden bank of fog. A good deal of other evidence incidentally supports the view that the density of the fog was intermittent. It would be quite incorrect though to say that it was a sudden fog in which the *Palembang* found herself enveloped. The real question is whether with fog signals of vessels at anchor in fog ahead, haze deepening and fog present in dense banks from time to time lower down, the *Palembang* ought to have proceeded as she did. The ships' bells which were being sounded could be heard, the Elder Brethren inform me, at three-quarters of a mile distance. Several bells were being sounded well below the place of collision.

Those in charge of the *Palembang* did not bring her to anchor when the peril ahead was manifest, but kept her under way at substantial speed. During the ten minutes next before the collision she covered 1 mile 2 cables, a speed representing 5.2 miles through the water on a flood tide of about two knots. She was, during this period, navigated at such speed that she could not avoid other vessels at the distance

1929
 THE
 PALEMBANG.
 The President.

at which they could be seen. In these respects the *Palembang* must be held to blame.

The main controversy with regard to the *Pakeha* depends upon whether she ought under the Port of London Bye-law 28 (e) to have been sounding a turning signal of four short blasts and two at intervals of not more than two minutes during some ten or twelve minutes before the collision, whether she did so sound, and if she did not whether her failure in this regard contributed to the collision.

By-law 28 (e), so far as is material, and relevant, says that "A steam vessel under way about to turn and whilst turning round, shall sound at intervals of not more than two minutes four short blasts in rapid succession followed, if turning with her head to . . . port by two short blasts."

By-law 5 provides definitions of the language used in the by-laws generally. It directs (inter alia) that "In these Bye-Laws . . . unless there be something in the subject or context repugnant to such construction . . . the expression 'under way' when used in relation to a vessel means when she is not at anchor, or moored, or made fast to the shore, or aground, and includes a vessel dropping up or down the river with her anchor on the ground." On behalf of the defendants it was argued that the *Pakeha* ought to be held to have been "under way" and not "at anchor" within the meaning of the by-laws.

On this part of the case several authorities were cited, and, in particular, *The Esk* (1); *The Wega* (2); and *The Romance*. (3) The decisions in these cases do not deal with the construction of the language used in the present by-laws. All three, however, show what is a vessel at anchor, in the general acceptance of that term among seamen.

In *The Esk* (1) Sir Robert Phillimore had to determine whether, under the Admiralty Regulations 1858, the schooner *Esk*, which had been at anchor between the Sunk and the Gunfleet Sands, was still at anchor when the brig *Gitana* was about to pass her at night in hazy weather. Her white light,

(1) L. R. 2 A. & E. 350, 353.

(2) [1895] P. 156.

(3) [1901] P. 15.

as a vessel at anchor, had been seen from the *Gitana* at a quarter of a mile off, and was still in view at the time of collision. The master of the *Esk* had, before the *Gitana* sighted her, called up all hands to get up anchor and they had heaved in chain to the extent of about two-thirds of the length let go with the anchor. There was conflicting evidence: for the *Gitana* it was said that the *Esk* was in motion and forging ahead and had moved a ship's length after she came in view of the *Gitana*; for the *Esk*, that the anchor was on the ground and holding at the time of the collision, and that the collision caused her to drive and the anchor to come home. The learned judge found that the *Esk* was not in fact holden by her anchor. "The true criterion," he said as to the application of the regulation (that is as to the display of navigation lights), "must be, whether the vessel be actually holden by and under the control of her anchor, or not. The moment she ceases to be so, she is in the category of a vessel 'under way,' and must carry the appointed coloured lights."

The Wega (1), a case tried before Gainsford Bruce J. in 1895, involved consideration of the Thames Bye-laws then in force. Under those by-laws by art. 18: "When a steam vessel is turning round or for any reason is not under command and cannot get out of the way of an approaching vessel" she is required to signify the same by four or more blasts of the steam whistle in rapid succession. Under art. 7 white lights fore and aft are prescribed for a "vessel . . . lying in the river at her own anchor or at mooring buoys where she will swing." The steamship *Galatea* came to anchor in Barking Reach in dense fog, took in her side lights and put up a riding light, and sounded three short blasts, but did not sound the signals required by art. 18. On the part of an approaching ship, the steamship *Wega*, which came into collision with the *Galatea*, it was alleged that the *Galatea's* red side light remained exposed for two or three minutes after she had come to anchor, and further that she failed to sound whistle signals, so that the *Wega*, misled into supposing her to be an

1929

THE
PALEMBANG.
The President.

1929
 THE
 PALEMBANG.
 The President.

on-coming ship, collided with her as she swung athwart the tide. Regarding the side light, the learned judge found her in fault, as alleged, and said "the side lights ought to have been taken in instantly she was held by her anchor." Again, Sir R. Phillimore's statement in *The Esk* (1) that the true criterion of a vessel being at anchor is "Whether the vessel be actually holden by and under the control of her anchor or not," was considered and adopted by Lord Gorell—then Gorell Barnes J.—in 1901 in *The Romance*. (2)

Before me counsel for the defendants relied on the judgment of Gainsford Bruce J. in *The Wega* (3) for a passage relating to whistle signals in which the learned judge held that the *Galatea* ought under the by-laws then in force, to have sounded after she had let go her anchor. As to the *Galatea's* failure in respect of sound signals, the learned judge said: "I think that a vessel throwing herself athwart the river and stopping her way to come to anchor is 'not under command' within the meaning of the rule, and that it was incumbent upon the *Galatea* to have sounded four or more blasts in rapid succession. . . . And I cannot doubt . . . that if the *Galatea* had sounded four short blasts or more so long as the danger lasted that a warning would have been given which probably would have enabled the *Wega* to avoid the collision. It is contended that as the *Galatea* was at anchor before the collision the circumstances which made it incumbent upon her to sound the danger signal had passed. But the danger cannot, I think, be said to have passed until the *Galatea* had swung to her anchor. . . . So long as she was swinging across the river, so long, as it seems to me, did the danger occasioned by her turning continue." To apply this decisive passage last quoted to the controversy in the present case would be to assume the obligation of the *Pakeha* in this case to have been governed by a regulation laying down that until a vessel held by her anchor has swung to her anchor so as (if tide is running) to ride with her head to the tide she will sound the signal of four and one or four

(1) L. R. 2 A. & E. 350, 353.

(2) [1901] P. 15.

(3) [1895] P. 156, 160.

and two short blasts directed by by-law 28 (e). It will be necessary to consider whether by-law 28 (e) has this effect.

So far as the judgment in *The Wega* (1) deals with the obligations in 1895 of vessels which, in course of being anchored, became out of command I may deal very concisely with the case made against the *Pakeha*. Art. 27 of the by-laws in force in 1895 imposed on all "vessels turning round or for any reason not under command and not able to get out of the way of an approaching vessel" a duty in common to sound certain signals. By-law 28 now in force deals distributively under (e) and (f) with a vessel "under way about to turn and whilst turning round," and a vessel "under way which for any reason is not under command or which is unable to manœuvre as required by these Bye-laws." The learned judge found that in *The Wega* (1) the *Galatea* though "at anchor" was "not under command." I was not invited in the present case to find that the *Pakeha* was not under command, nor indeed to hold that she made any default under by-law 28 (f), and on the advice given me by the Elder Brethren I have no doubt that, at all material times, the *Pakeha* was under command, and able to manœuvre so far as a vessel may do which is held by her anchor.

To return to by-law 28 (e), what is to be determined first is whether the *Pakeha*, when she was "about to turn and whilst turning round," and not "at anchor," omitted to sound signals obligatory upon her under by-law 28 (e)? It is further to be determined whether, if the *Pakeha* had so sounded, the *Palembang*, warned by such signals, would certainly or in reasonable probability have avoided collision.

The material period of time is that from 2.45 to 2.55. At 2.45 the pilot of the *Pakeha*, having proceeded with his engines stopped for some minutes, ordered the ship's helm hard-a-starboard. He then put the engines full speed astern, and when the vessel had swung two or three points he ordered the anchor to be let go, and presently directed that the navigation lights should be switched off, the anchor lights switched on,

1929 — and the ship's bell rung, which was done. At the time it
THE — was done the anchor was on the ground. Thirty fathoms
PALEMBANG. of chain were paid out, the anchor held, and was reported
The President. to be holding. The riding lights were switched on at about
the time the anchor held. Immediately before putting the
helm hard-a-starboard the *Pakeha* sounded the turning signal
of four short blasts and two. I do not find that she sounded
it subsequently. The anchor was reported to be holding
within two minutes, and my impression, from the pilot's
evidence, is that he did not consider it incumbent on him,
under the regulations, to sound any more turning signals.
He took the view, as I think, that from the time the vessel
was held by her anchor, his proper course was to be showing
anchor lights instead of navigation lights, and instead of
blowing long blasts for fog to sound the ship's bell.

When the *Pakeha* was swinging toward a direct down river
heading—head to tide—engine action half ahead and ahead
for a minute and a half, was taken to avoid a small vessel
on her starboard quarter, and the vessel being cleared the
engines were stopped, put full astern for about a minute,
and again stopped. They remained stopped until—the
Pakeha, having by this time a heading of about east south
east, one point southward of a direct down river course—the
masthead lights of the *Palembang* were made out above the
bank of fog, the *Palembang* approaching the *Pakeha* fine on
her port bow, her masthead lights opening as though she were
under a starboard helm.

During several minutes—probably seven or eight—before
the *Pakeha's* swing at her anchor was interrupted by her
engine action last mentioned, and during a minute after
that interruption had passed, no turning signals such as are
prescribed in by-law 28 (e) were being sounded by the *Pakeha*.
Was she required by the by-law to give them? Was she,
that is to say, a vessel under way and turning, and not
at anchor?

If I am to apply the criterion Sir Robert Phillimore supplied
in his judgment in *The Esk* (1) I must, on my view of the

evidence here, find that the *Pakeha* was actually holden by and under the control of her anchor during all the time in question. That was her position according to the meaning which long ago was judicially set upon the words I have to apply. To see whether this meaning is applicable to the words "at anchor" under by-law 5 I examine the particular by-law, with the associated regulations, and the by-laws generally, for any other instances there may be of the use of the same words, in order to ascertain whether there is ground for saying that in the Bye-laws, 1914-26, the term "at anchor" has a meaning other than its common meaning. By-law 14 which specifies the lights to be shown by vessels "at anchor" and by-law 15, dealing with vessels "at anchor" below Bow Creek, appear to me certainly not to suggest any other than this common meaning. Moreover, under by-law 82 a breach of any regulation is an offence summarily punishable. I am not aware of any ground on which a by-law so enforceable can be construed less strictly in a damage case than it would be if some breach were the subject of proceedings to enforce a penalty.

On the whole I find myself bound to hold that within the meaning of the definition in by-law 5 the *Pakeha* was at anchor at the time in question and accordingly was not, under by-law 28 (e), required during this time to be sounding a turning signal.

I may add that as a matter of navigation—apart from the by-laws—I am advised that from the time the *Pakeha's* anchor held and her cable was taut, she could not be said to have been under way, though different considerations would arise if, from any cause, she steamed up to her anchor so that the cable ceased to hold her head. This I am satisfied the *Pakeha* did not do. The Elder Brethren inform me further that in the case of a vessel which has let go her anchor and is held by it, and thereafter is using her engines to assist her in getting the heading at which she is to lie, it has not, in recent years, been a common practice in the navigation of the Thames to sound a turning signal during such movement, provided the anchor holds and the cable is taut.

1929

THE
PALEMBANG.
The President.

1929

THE
PALEMBANG.
The President.

I proceed to deal with the claim on the part of the *Palembang* that if warned by sound signals from the *Pakeha* under by-law 28 (e) she would have avoided collision. I attended carefully to the evidence of her pilot and have since discussed with the Elder Brethren the action and relative situation of the two vessels. The pilot certainly did not appear to me, so far as his personal view was concerned, to attribute the collision to any failure of the *Pakeha* to blow a turning signal. He, personally, did not regard the absence of such a signal as a default on the part of the *Pakeha*, though he adopted the view that if he had heard four blasts and two just before he entered the fog he would have "turned his ship round." I was satisfied such a signal would not have conveyed to him that a vessel held by her anchor was coming to a direct down river heading in the fog, or anything more than that a vessel under way and not at anchor was turning higher in the river above the bank of fog. I believe also that if such a signal had been sounded up river of him, five, three, or two minutes before the collision, he would not have done other than he in fact did. He expected to get safely through notwithstanding all the fog signals ahead. "If I had turned and lost the tide," he said, "I should have been much to blame."

I may add that on the question of the materiality of the signal of four blasts and two under the circumstances, the Elder Brethren have called my attention to the relative headings of the two ships at the time in question; to the mode in which during the time the *Pakeha* pivoted on a point very little abaft of her stem; to the fact that with knowledge of the position of the *Pakeha* those in charge of the *Palembang* expected to pass her, heading down river as she then was, by means of starboard helm action; and to the fact that the *Palembang's* collision was not a collision with the side or stern of a vessel turning but with a vessel heading in nearly an opposite direction to herself. I do not enlarge on these matters, because those I have already dealt with seem to me to dispose of the particular questions I have had under consideration.

Complaint was made on the defendants' behalf that when the *Palembang* was seen to be approaching and crossing the bow of the *Pakeha*, the *Pakeha* did not pay out cable to her anchor and go astern. This I have discussed with the Elder Brethren and I find that in the *Pakeha's* position the doing of the things suggested, if it were effective, would have involved her in new risks, but that it probably could not have been effectively done in the time available after risk of collision arose. There was a further allegation that the *Pakeha* came ahead into collision; I am satisfied she did not.

A contributory cause of the collision was, the Elder Brethren consider, the letting go of the starboard anchor of the *Palembang*, by reason of some misunderstanding on the part of her chief officer immediately before the collision. Her engine action at that time, also taken independently of her pilot, if it did not contribute to the casualty did not avoid or diminish it. Each action showed that the *Palembang* was not, at the material time, under the steady control which would no doubt have been found on her bridge under ordinary circumstances.

The result of the various considerations on which I have dwelt is, that I find the *Palembang* solely to blame.

Solicitors for the plaintiffs: *Ince, Colt, Ince & Roscoe.*

Solicitors for the defendants: *Waltons & Co.*

E. C. M. T.

1929
THE
PALEMBANG.
The President.

1929

*In the Estate of TAYLOR.*April 17, 29.

Probate—Settled Land—Compound Settlement under Wills of successive Testators—Death of last Tenant for Life and determination of Trusts under earlier Will—General Probate of Will of last Tenant for Life save and except settled Land—Probate limited to settled Land granted to Tenant for Life under later Will as special Executor of last Tenant for Life under earlier Will—Settled Land Act, 1882 (45 & 46 Vict. c. 38)—Settled Land Act, 1925 (15 Geo. 5, c. 18)—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 22.

Land was devised by H. T. on trusts providing for limited ownerships and in default of issue for the right heirs of H. T. C. H. T., who was the right heir of H. T., by his will appointed the applicant T. T. executor and trustee and devised his lands to the use of the applicant for life with remainders over. On January 1, 1926, the commencement of the Settled Land Act, 1925, the lands passing under the wills of H. T. and C. H. T. remained subject to the settlement created by the will of H. T., and, in the event of the termination of the limited ownerships under the will, also subject to the settlement created by the will of C. H. T. On the same date T. J. T. was tenant for life under the will of H. T. By a vesting deed dated April 16, 1926, the lands were declared to be vested in T. J. T. in fee upon the trusts operating from time to time under the will of H. T. or otherwise.

T. J. T. died April 27, 1928. General probate of his will including the settled land was granted to his executors in the first place. Later the grant was amended limiting it "save and except the settled land vested in the testator settled previously to his death and remaining settled notwithstanding his death."

T. J. T. having died without issue, the applicant T. T. then became tenant for life in possession under the settlement created by the will of C. H. T. as well as the trustee of that settlement.

On appeal from the registrar a grant of probate of the will of T. J. T. limited to the settled land was directed to issue to the applicant as special executor of T. J. T.

In re Bridgett and Hayes' Contract [1928] Ch. 163 distinguished.

MOTION for a grant of administration to settled land.

Hugh Taylor died on August 30, 1868, and devised hereditaments to certain persons and their issue for life interests and for estates tail, and in default of issue of the last limited owner to the use of the testator's right heirs for ever. Charles Henry Taylor was the right heir, and died on July 13, 1892, having by his will appointed the present applicant Thomas Taylor his executor and trustee. He devised his lands to the use of the applicant for life with remainder to his first and other sons in tail male, with remainders over, and the will directed that his trustees or trustee should be

those of his will for the purposes of the Settled Land Act, 1882. On January 1, 1926 (the commencement of the Settled Land Act, 1925), the hereditaments passing under both wills were subject to the settlement created by the will of Hugh Taylor, and in the event of the termination of the limited ownerships under the said will also subject to the settlement created by the will of Charles Henry Taylor. On the same date Thomas John Taylor was tenant for life under the will of Hugh Taylor, and by a vesting deed, dated April 16, 1926, the trustees thereof declared that the hereditaments were vested in Thomas John Taylor in fee, and that he should stand possessed of them upon the trusts on which they should be held from time to time under the will of Hugh Taylor or otherwise. Thomas John Taylor died on April 27, 1928, and general probate of his will with a codicil thereto was in the first instance granted to his executors, but subsequently the grant was amended limiting it "save and except" the settled land vested in the testator settled previously to his death and remaining settled notwithstanding his death.

1929
TAYLOR,
In the Estate
of.

Thomas John Taylor having died without issue the applicant then became tenant for life in possession under the settlement created by the will of Charles Henry Taylor as well as trustee of the settlement. The result was that there was settled land vested in Thomas John Taylor settled previously to his death and not by his will.

The approximate value of the property was 26,600*l*.

On application made in the Principal Registry for a grant of probate to the applicant as special executor of the will of Thomas John Taylor limited to the settled land, the registrar refused to make one on the authority of *In re Bridgett and Hayes' Contract* (1) followed in this Court in the case of *In the Estate of Bordass*. (2)

The applicant now moved the Court for the grant in this form.

T. Bucknill and *Alan E. Ellis* for the applicant. The application is made under the Administration of Estates

(1) [1928] Ch. 163.

(2) [1929] P. 107.

1929
TAYLOR,
In the Estate
of.

Act, 1925 (15 Geo. 5, c. 23), s. 22, and involves consideration of the decision in *Bridgett and Hayes' Contract* (1) and of its applicability to the form of grant in the present and similar cases. Unless s. 22 is to be followed in cases similar to the present the Probate Court will have cast upon it the burden of investigating in every case complicated questions whether the settlement is at an end. The principle of *In re Bridgett and Hayes' Contract* (1), we submit, is restricted to contracts for sale. It does not extend to devolution of title on a succession apart from sale. Title on devolution must depend upon the grant being made to the proper person under s. 22,—i.e., the special executor—and it is very undesirable in such cases that this Court should have to inquire whether there is a settlement which has ended. The present is a simple case under s. 22. The two wills form a compound settlement subject at material times to the operation of the Administration of Estates Act, Part I., which deals with the devolution of real estate. Part II. deals with executors and administrators, and s. 22, which is in that part of the statute, is perfectly general.

The question here is not that decided in *Bridgett and Hayes' Contract*. (1) There it was held that s. 22 did not apply, because the land had ceased to be settled, and the passage in the judgment at p. 169 to the effect that the legal estate in settled land cannot vest in a special executor when the Court of Probate has granted general administration to another person does not apply to this case. If the test of the settlement coming to an end is the true one s. 22 could not apply to the ordinary stock form of settlement, because that almost always provides for a resettlement: it cannot be right that almost all the simple cases should be excluded from the operation of s. 22. In this case the settlement by the will of Charles Henry Taylor continues to operate, and s. 22 applies in terms to it.

[They also referred to *In the Estates of John and Amelia Gibbings*. (2)]

Cur. adv. vult.

(1) [1928] Ch. 163.

(2) [1928] P. 28.

April 29. BATESON J. [after stating the facts and expressing approval of the limited form of grant made by amendment to the estate of Thomas John Taylor continued :] I think that that was a proper reservation, and that it is correct. Up to Thomas John Taylor's death the land was subject to the settlements made up of, first of all, Hugh Taylor's will, which ceased to operate when Thomas John Taylor died without issue; and secondly, Charles Henry Taylor's will, which came into operation the moment Hugh Taylor's will ceased to operate. In other words the land was always settled under one instrument or the other, or perhaps rather under both as a compound settlement. If so it seems to me that the Administration of Estates Act, s. 22, applies in plain terms. Sect. 22, sub-s. 1, says: "A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land. In this sub-section "settled land" means land vested in the testator which was settled previously to his death and not by his will." I emphasize the word "his" in the latter proviso. Counsel for the applicant said in his argument that on January 1, 1926, the land was settled on Thomas John Taylor for life, with remainder to Thomas Taylor for life, with remainder to Thomas Taylor's sons; that there was a compound settlement by the effect of Hugh Taylor's and Charles Henry Taylor's wills, and that there is no question but that it is settled land. I agree with that argument. *In re Bridgett and Hayes' Contract* (1) is according to counsel not an authority against him, because it relates only to cases where land has ceased to be settled at all. That argument I think is correct. Further, the real decision in that case was that as a general grant had been made no purchaser could go behind the grant, and the observations in the judgment on s. 22 are really obiter. I need hardly say that if I thought this case was the same as *In re Bridgett and Hayes'*

1929

TAYLOR,
In the Estate
of.

(1) [1928] Ch. 163.

1929 *Contract* (1) I should have hesitated not to follow it, especially
 TAYLOR, as Hill J. in the cases of *In the Estate of J. and M. C. Bordass* (2)
In the Estate of and *In the Estate of Birch* (3) followed *Bridgett and Hayes'*
of. *Contract.* (1) If Charles Henry Taylor had not settled the
 Bateson J. land by his will *In re Bridgett and Hayes' Contract* (1) would, I
 suppose, undoubtedly apply, but as here the land was settled
 both under Hugh Taylor's and Charles Henry Taylor's wills,
 I think it was always settled land, and the section applies
 to it.

Of course, I have only heard counsel in support of the
 motion for a grant. I have not heard any opposition to it,
 but counsel have satisfied me that the right form of grant
 in a case of this kind is the one applied for.

There will be an order in the terms of the motion.

Solicitors: *E. Flux & Leadbitter, for Leadbitter & Harvey,*
Newcastle-upon-Tyne.

(1) [1928] Ch. 163.

(2) [1929] P. 107.

(3) [1929] W. N. 42.

R. M. M.

PRINSEP *v.* PRINSEP.

1929
July 1.

THIS case (reported ante p. 225) now came on again on the question of the form and amount of a re-settlement (see the judgment at pp. 236, 237, of the report).

The Court (HILL J.) now approved the following minutes of order :—

1. Trustee : The Public Trustee.
2. Trust fund 40,000*l.* Securities to this value to be transferred.
3. Usual powers to vary investments.
4. The trustee to hold the trust fund upon the following trusts :—
 - (a) Upon trust during Mr. Prinsep's lifetime, to apply the income for the maintenance, support, etc., of Mr. Prinsep and any wife and issue of his (other than Jane Prinsep, the child).
 - (b) After the death of Mr. Prinsep then subject to any appointment of life interest to a wife, in trust both as to capital and income for Mr. Prinsep's issue by any marriage, as he shall by Deed or Will appoint and in default of, and subject to any such appointment in trust for Mr. Prinsep's children by any marriage (other than Jane Prinsep) who attain twenty-one years, or being female marry under that age, and if more than one in equal shares.
 - (c) If no child of Mr. Prinsep's attain a vested interest, then in trust for Mr. Prinsep absolutely.
5. Power to Mr. Prinsep by will or codicil to appoint in favour of any wife surviving him, all or any part of the income of the trust fund for her life.
6. The rest of the trust funds to be transferred or paid to Mr. Prinsep for his absolute use and benefit.

The draft of the settlement for the benefit of former wife and daughter and also of the settlement above mentioned to be settled by conveyancing counsel to the Court.

1929 PRINSEP v. PRINSEP.	Costs of all parties other than Mr. Prinsep to be taxed as between solicitor and client and paid out of the balance of the funds after transferring the 40,000 <i>l.</i> securities as now ordered.
--	---

R. M. M.

THE ZILLAH.

1929 March 22, 25, 26.	<i>Shipping—Collision—Narrow Channel Rule—Regulations for Preventing Collisions at Sea, 1910, art. 25—Navigable Channel divided into Two Narrow Channels—Cork Harbour By-Laws, 1909, by-laws 41, 53.</i>
---	--

Art. 25 of the Regulations for Preventing Collisions at Sea, 1910, provides that: "In narrow channels every steam vessel shall when it is safe and practicable keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

A collision occurred between the plaintiffs' and the defendants' steamships in what is known as the inner man-of-war anchorage, in Queenstown Harbour, where the navigable fairway is divided in two by a line of Admiralty mooring buoys. At the time both vessels were navigating in the water to the north of the line of buoys, the plaintiffs' vessel going up and the defendants' vessel coming down the channel. For the plaintiffs it was contended that the whole of the fairway, both to the north and to the south of the line of mooring buoys, constituted one narrow channel, and that the defendants' vessel, navigating down to the north of the line of buoys, was committing a breach of art. 25. On behalf of the defendants it was argued that the line of buoys divided the fairway into two narrow channels, within the meaning of art. 25, and that the plaintiff vessel was in fault for being on her wrong side of the northern channel.

In 1909 the Cork Harbour Commissioners, "in pursuance of the powers vested in them by the Cork Harbour Acts, 1820-1903," issued, with the approval of the Board of Trade and the assent of the Lords Commissioners of the Admiralty (required by s. 60 of the Cork Harbour Act, 1903, in virtue of their powers under the Dockyard Ports Regulation Act, 1865), by-laws for the regulation of Queenstown Harbour. By by-law 41: "Any regulations for preventing collisions at sea for the time being in force, under the provisions of the Merchant Shipping Acts, shall be deemed to apply to the port, and shall be construed as if the following by-laws, Nos. 42 to 52 (inclusive), were added thereto, and the entire fairway shall be deemed to be a narrow channel." By by-law 53: "The foregoing by-laws, where they refer to any part of the man-of-war anchorages or any other part of the dockyard port, shall apply to any merchant ships that may be temporarily using such parts of the port."

Prefixed to these by-laws was an interpretation clause which defined "fairway" as "the space within the port for the time being reserved as a highway for vessels in motion."

1929

THE
ZILLAH.

In 1916 the Harbour Commissioners issued a "Description of Fairway," para. 6 of which was as follows: "From the eastern limit of the inner man-of-war anchorage to the White Point Buoy there are two fairways—the northern fairway and the southern fairway. The northern fairway is bounded on the north by an imaginary line from 20 fathoms south of Copper Point Buoy to the western end of Queenstown Deep-water Quay, and thence towards White Point House until Rushbrooke Church bears N.W. by W. $\frac{1}{2}$ W., and thence to White Point Buoy showing a fixed white light, and on the South by the line of Admiralty battleship's mooring buoys. The southern fairway is bounded on the north by the line of Admiralty battleships' mooring buoys, and on the south by the line of Admiralty torpedo boat and other mooring buoys along the north of Spit Bank and Haulbowline"—

Held, that subject to the overriding jurisdiction of the Lords Commissioners of the Admiralty the Harbour Commissioners had power to reserve space within the port as a highway for vessels in motion, and that the effect of the by-laws, as explained by the reservation contained in the "Description of Fairway," was to constitute in the locality in question two separate fairways, divided by the line of Admiralty battleships' mooring buoys, in either of which vessels, whether proceeding up or down the harbour, were entitled to navigate, and that the plaintiffs' vessel was to blame for breach of art. 25 in failing to keep on her own starboard side of the northern fairway.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Alison* and her master and crew proceeding in respect of the loss of their clothes and private effects.

The defendants were the owners of the steamship *Zillah*.

On October 22, 1918, a collision occurred between the *Alison* and the *Zillah* in the inner man-of-war anchorage, Queenstown Harbour, where the river is bisected by a line of Admiralty battleships' mooring buoys, forming a northern and a southern channel. At the time both vessels were navigating in the water of the northern channel, and it was found by the Court that the casualty occurred on the south side of the northern channel. The *Alison* was proceeding up the river, and the plaintiffs' case was that the whole of the water between the north and the south shores constituted one narrow channel within the meaning of art. 25, and that the *Zillah*, proceeding down, was guilty of a breach of art. 25 in being to the north of the line of mooring buoys. The

1929

THE
ZILLAH.

defendants' case was that in the locality in question there were two narrow channels, in either of which vessels, whether proceeding up or down, were entitled to navigate, and that the *Alison* was in fault for a breach of art. 25 in failing to keep on her own starboard side of the northern channel.

The Lords Commissioners of the Admiralty exercise authority over Queenstown Harbour as a dockyard port by virtue of the Dockyard Ports Regulation Act, 1865 (28 & 29 Vict. c. 125), but in 1909 the Cork Harbour Commissioners, pursuant to the powers vested in them by local Acts, 1820–1903, issued by-laws for the regulation of navigation within the port. These by-laws were duly sanctioned by the Lords Commissioners of the Admiralty, as required by s. 60 of the Cork Harbour Act, 1903 (3 Edw. 7, c. cclvi.).

The material by-laws are fully set out in the headnote and judgment.

Digby K.C. and *G. St. C. Pilcher* for the plaintiffs.

Stephens K.C. and *Lewis Noad* for the defendants.

HILL J. The collision in this case happened between two small steamships, each in charge of a pilot, at 7.15 P.M. on October 22, 1928, in fine clear weather, and on a moonlight night, in Queenstown Harbour. The place was a little above the No. 7 buoy of the Admiralty moorings, at which the destroyer *Sea Wolf* was lying, heading in a N.E. or N.N.E. direction. If the line of the Admiralty buoys be regarded as the southern boundary of the channel and the north shore as the northern boundary, the place of the collision was substantially to the south of the middle line of the channel. It may possibly be, having regard to the evidence from the *Sea Wolf*, that it was even south of the line of the Admiralty buoys, but I do not think that matters. Immediately before the collision there is no doubt the *Zillah* was navigating in that channel, if it is to be regarded as a separate channel—namely, the channel between the Admiralty buoys and the northern shore.

The *Alison* was proceeding up the channel at five or six knots and the *Zillah* was coming down at about eight knots.

When they were in collision the stem of the *Zillah* struck the starboard side forward of the *Alison* and the final result was that the *Alison* sank. The *Alison* saw the *Zillah* at a distance of about 600 yards, a little more or a little less, and the *Zillah* saw the *Alison* at 500 or 600 yards, a little more or a little less. Each went full astern at the last, but it is clear on the speeds that the interval between the sighting and the collision was very short, not much more than a minute.

When I say the "channel," I mean the waterway between the line of the Admiralty buoys and the north shore. I shall presently have to consider whether that is to be regarded as the channel by itself. For the moment I assume that it is so to be treated, and I consider the case from that aspect.

[His Lordship then reviewed the evidence and found that if the waterway between the line of the Admiralty battleships' buoys and the north shore was to be treated as a distinct channel the *Alison* was alone to blame, for failing to keep on her own starboard side of the channel. He continued.]

But that is all on the assumption that the two ships were navigating in the same narrow channel, that is to say, the channel bounded on the south side by the Admiralty buoys and on the north by the north shore. On that assumption the case is clear. The *Alison* was in her wrong water; the *Zillah* was in her right water. The *Alison* was brought there by starboarding from mid-channel, when by porting she could have got to the other side of the channel.

The main question on the argument is what is the true view about these waters? The plaintiffs say that the channel in this place is the water between the north shore and the south shore, in the neighbourhood of Haulbowline. They say that it is all one channel with, it is true, the Admiralty moorings down the centre, and that down-coming ships must keep to the south of the mooring buoys and the up-coming ships to the north of the mooring buoys. That is the plaintiffs' contention. If they are right then it is the *Zillah* and not the *Alison* which was in her wrong water. On the other hand, the *Zillah* says: "I was rightly proceeding down in a channel which was defined on my starboard hand by the line of the

1929

THE
ZILLAH.

HILL J.

1929

THE
ZILLAH.
HILL J.

Admiralty buoys and on my port hand by the north shore. I was bound to regard that as my channel and the *Alison* was also. I ought to have been on the south side and the *Alison* on the north."

Prima facie, I have no doubt that in an ordinary way the whole of the water between the two shores at a narrow place of this kind is to be regarded as one channel, and if there were nothing else in the case and no Admiralty rights concerned I should conclude there was one channel off Queenstown, of which the north side was the north shore, and the south side the shallow waters towards Haulbowline and the Spit Sand. But at the same time there can be no doubt that local harbour authorities have power to define the channels in the waters under their jurisdiction, as we find constantly done by a line of black buoys on one side and red buoys on the other. Nobody has suggested that a channel so indicated by the local authority is not to be regarded as a channel within the meaning of the rule.

Here the position is rather peculiar, because of the overriding authority of the Admiralty over Queenstown Harbour. As appears in Mr. Stuart Moore's Rules of the Road at Sea, at p. 375, an Order in Council was made in August, 1903, by virtue of the Dockyard Ports Regulation Act, 1865, which defines the limits of the Dockyard port of Queenstown, and includes in those limits certain man-of-war anchorages. One of those anchorages is the man-of-war inner anchorage, and as so defined it includes the whole of the waters with which we are concerned.

That same Order in Council, while putting these waters wholly under the Admiralty, provides that a fairway shall "be kept through the inner man-of-war anchorage, in such a direction with regard to H.M.'s moorings and ships as circumstances may from time to time require."

The by-laws which have been put in were made by the Cork Harbour Commissioners in 1909, in pursuance of the powers vested in them by the Cork Harbour Acts, 1820 to 1903; they were sanctioned by the Board of Trade on September 25, 1909, and received the consent of the Lords Commissioners of

the Admiralty on November 30, 1909, and that consent is expressed to be as required by the Cork Harbour Act, 1903. That latter Act provided that nothing should take away or diminish or alter any rights or powers conferred on the Lords Commissioners of the Admiralty by the Dockyard Ports Regulation Act, 1865. No Order in Council shall be made and the Harbour Commissioners shall not without the consent of the Lords Commissioners of the Admiralty exercise any jurisdiction whatever over such portions of the port as may be reserved for the use of H.M. ships at anchorage, except such control over navigation by by-laws as is thereafter mentioned (Cork Harbour Act, 1903, s. 60, 3 Edw. 7, c. cclvi.). It was laid down that no by-laws made or relating to the navigation through the man-of-war anchorages or affecting them in any way "shall be valid without the previous consent of the Lords Commissioners of the Admiralty, and in any general by-laws made . . . by the Commissioners, it is in future to be clearly stated that such by-laws do not affect the man-of-war anchorages" except where so provided for with the consent of the Lords Commissioners of the Admiralty. No. 2 of the by-laws in force says: "These by-laws shall not affect the man-of-war anchorages except as provided by by-law No. 53;" and by-law 53 says: "The foregoing by-laws, where they refer to any part of the man-of-war anchorages or any other part of the dockyard port, shall apply to any merchant ships that may be temporarily using such parts of the port."

Then I come to by-law 41, which says: "Any regulations for preventing collisions at sea for the time being in force, under the provisions of the Merchant Shipping Acts, shall be deemed to apply to the port, and shall be construed as if the following by-laws, Nos. 42 to 52 (inclusive), were added thereto, and the entire fairway shall be deemed to be a narrow channel. Provided that where any inconsistency arises between the general regulations and any of these by-laws, the provisions of these by-laws shall have effect." The words are: "The entire fairway shall be deemed to be a narrow channel." I have to ask myself what is the meaning

1929

THE
ZILLAH.
HILL J.

1929
THE
ZILLAH,
Hill J.

of "fairway." I must find what is a fairway as defined by the by-laws, and in the interpretation clause I find that the word "fairway" means "the space within the port for the time being reserved as a highway for vessels in motion." I have to find what is that fairway. No doubt it is in contemplation that under the general overriding jurisdiction of the Admiralty over the whole harbour, coupled with the provisions of the Order in Council, the Lords Commissioners of the Admiralty are to see that a fairway shall be kept through the inner man-of-war anchorage—that a space is to be reserved—and I ask: Reserved by whom? It is obvious to me that the consent of the Lords Commissioners of the Admiralty must be obtained to any reservation. The reservation must be made in consultation with them, because they have the general control of the matter, but subject to that, and to their primary right to use what part of the harbour they please, as they please, provided they do leave a fairway, I think the reservation must be defined by the Harbour Commissioners. It contemplates something to be done from time to time, and until I find that somebody has from time to time reserved a space within the port as a highway, I am unable to say that this, that, or the other is a fairway.

I must look a little further. The by-laws which are published by the Harbour Commissioners are prefaced by several pages headed "Description of Fairway." It does not on the face of it appear whether this description of fairway was or was not incorporated in the document approved by the Board of Trade and consented to by the Lords Commissioners of the Admiralty. Nobody has been able to put before me the King's Printer's copy of this document, nor has a research in the London Gazette produced any result. I do not know, but I am very much inclined to think that it was included, for unless I read the "Description of Fairway" with the by-laws I can see no reason at all why the by-laws should have included definitions of the man-of-war outer and the man-of-war inner anchorages; there are references in the actual by-laws to the man-of-war

anchorages, but no distinction is made as between the outer and inner man-of-war anchorages. Yet it has been necessary in the by-laws to define separately the outer and the inner anchorage, and it makes me think it is highly probable that in the document which was approved the "Description of Fairway" was included as a preliminary to the by-laws, and is to be read with them.

Supposing that that is not so, I still have to ask myself what is the meaning of "fairway" in art. 41. To do that I have to ask myself what, for the time being, was the space within the port reserved as a highway; and, at any rate, in 1916, the Commissioners were publishing along with their by-laws a "Description of Fairway"; and that I take to be a statement of theirs of the space within the port which was for the time being reserved as a highway. That brings me to the description. The description defines the fairway for different sections of the port, and when it comes to the inner man-of-war anchorage it says that it is not one fairway, but two fairways, one to the north and the other to the south of the Admiralty battleship mooring buoys; and it describes the limits of those two fairways.

I think, therefore, that by the effect of the by-laws, as explained by the reservation which is contained in the description, there was in this locality a separate fairway bounded on the north by an imaginary line from 20 fathoms south of Copper Point Buoy to the western end of Queenstown Deep-water Quay, and thence towards White Point House until Rushbrooke Church bears N.W. by W. $\frac{1}{2}$ W., and thence to White Point Buoy showing a fixed white light, and on the south by the line of the Admiralty battleship's mooring buoys. There was also another fairway bounded on the north by the line of the battleship's mooring buoys, and on the south by the line of Admiralty torpedo-boat and other mooring buoys along the north of Spit Bank and Haulbowline. That I take to be the effect in law.

The matter, however, does not rest there, because upon the evidence it is pretty clear that in practice for a long time, going back long before this particular description of the

1929

THE
ZILLAH.
Hill J.

1929
THE
ZILLAH.
Hill J.

fairway was published—I dare say there was some similar description; I do not know—ships going up and down have treated what I now call the northern fairway as a fairway which each of them was entitled to navigate. Down-coming ships have not hesitated to come down in that water. Nobody has ever heard, so far as the evidence goes, of anybody being censured or prosecuted for coming down in that water. It is quite true that it is usually a matter of convenience for them, because they have to drop their pilot at the Custom House, which is on the north side. On the other hand, it does seem that some of the passenger ships, especially where the master has a pilot's certificate, come down to the south of the line of buoys, because they are not likely to meet anybody coming up and need not reduce their speed, for they have not to put in for a pilot. It is a shorter course. That, however, does not prevent it from being recognized as right for down-coming ships to proceed down the north channel. All this only shows that people in the neighbourhood of these waters regard that water as that which the Harbour Commissioners have said it is—namely, a separate fairway.

I therefore come to the conclusion that when by-law 41 speaks of the entire fairway being deemed to be a narrow channel it means in this locality the entire fairway which lies between the north shore and the Admiralty battleship's mooring buoys, the other entire fairway which lies to the south of the battleship's buoys being a separate and distinct fairway.

The result is that the *Zillah* was entitled to proceed down to the north of the Admiralty buoys, provided she kept on her starboard side of that fairway. The *Alison* was entitled to proceed up in those waters, but under the obligation of keeping on her starboard side thereof. We come back, therefore, to the old original position. These two ships were navigating in a narrow channel. The collision occurred in the *Zillah's* water, and the *Alison* had got there by wrongly starboarding. The *Zillah* had done nothing wrong, because the only duty you could put upon her would be to go full

astern, and she did that before the collision and within a very short time of being compelled to do so by the *Alison*. The *Alison* is alone to blame.

1929

THE
ZILLAH.

Solicitors for the plaintiffs: *W. & W. Stocken*.

Solicitors for the defendants: *Pritchard & Sons, for Batesons & Co., Liverpool*.

A. W. G.

THE HAYLE.

1929

Shipping—Damage—Defective Berth—Harbour Master acting as Ship's Agent—Information acquired as Harbour Master—No Duty to inform Ship-owners—Notice on Quay containing Exemptions from Liability. May 15, 16.

The plaintiffs' steamship was damaged by lying in an uneven berth at a wharf owned by the defendants, a railway company. The defendants' harbour master at the wharf acted as ship's agent for the plaintiffs for the limited purposes of reporting the ship at the Custom House, paying the pilot, and providing the master with funds to pay the labourers for discharging the cargo. Before the plaintiffs arranged to send the vessel to the wharf the harbour master had in writing informed them that the berths were "perfectly safe for steamers to lie aground."

The defendants alleged that the vessel came to the wharf subject to printed conditions, known to the harbour master, whereby the railway company did not represent, warrant or guarantee that the berths alongside the wharf were safe or suitable for the accommodation of vessels, and all vessels brought alongside remained at the sole risk of their owners and on the terms that the company should "in no event whatever be liable for any damage . . . however caused to or suffered by any such vessel." The harbour master did not in fact know that the berth was defective:—

Held, that even if the harbour master ought to have known of the defective condition of the berth (which was doubtful), it was not his duty to impart to the plaintiffs information acquired as harbour master, which would be against the interests of the defendants and of the harbour master to disclose; that the notice did not form part of the contract between the plaintiffs and the defendants, and afforded the defendants no defence; and that accordingly the plaintiffs were entitled to judgment.

FURTHER HEARING on questions of law arising in an action of damage at berth.

The plaintiffs, Richard Hughes & Co., as owners of the steamship *Hayle*, claimed against the Southern Railway Company the amount of the damage alleged to have been sustained by the *Hayle* while lying in a berth at the company's wharf at Fremington, near Barnstaple.

1929

THE
HAYLE.

Before any arrangement was made to send the *Hayle* to Fremington the plaintiffs wrote to the station master, who was also the harbour master, for information as to the depth of water and the size of vessels which could be berthed alongside the wharf, and they added: "Please state whether the berths at your wharf are always safe for steamers to lie aground." The station master replied as follows: "The berths are perfectly safe for steamers to lie aground. For your information I may say I act as ship's agent to almost all boats coming here, and if you should be sending anything along I would be pleased if you consigned to me. Being station, as well as harbour master, I am always on the spot to attend to all requirements."

On October 23, 1927, the *Hayle*, a vessel of 476 tons gross register, arrived at Fremington with a cargo of coal to be discharged at the defendants' wharf. She berthed alongside the quay, and the harbour master, as agent for the ship, paid the pilot, secured labourers for the discharge, and advanced money to the master of the *Hayle* to pay them. The harbour master received 1*l.* 1*s.* for his agency services.

The plaintiffs alleged that the berth in which the *Hayle* was moored was in a defective and dangerous condition for her to lie in and take the ground, and at the trial of the action on April 9-12, 1929, before Bateson J., who was assisted by Elder Brethren, the learned judge found that the berth at the time in question was uneven and not fit for the *Hayle* to ground upon.

The defendants contended that the *Hayle* was brought to the berth subject to the following conditions, which were contained in a printed notice, the terms of which, it was alleged, though not actually brought to the plaintiffs' notice before the *Hayle* received damage, were known to the pilot of the *Hayle* and to the harbour master, who was the plaintiffs' agent, and were also exhibited on a notice board on a shed on the quay: "The company do not represent warrant or guarantee that the berth . . . alongside or adjacent to this wharf . . . are safe or suitable for the accommodation of vessels . . . All vessels . . . brought alongside . . . shall

be and remain so brought alongside or moored at the sole risk of the owners or masters thereof and on the terms that the company shall in no event whatever be liable for any damage . . . however caused to or suffered by any such vessel."

His Lordship accordingly gave judgment for the plaintiffs subject to the question whether the defendants could escape liability by reason of the dual capacity in which the harbour master was acting and the terms of the notice.

Dunlop K.C. and *Alfred Bucknill* for the plaintiffs.

Schiller K.C., *Digby K.C.* and *Dumas* for the defendants.

The arguments are fully set out in the judgment. In addition to the cases therein referred to, counsel for the defendants, on the question of constructive notice, cited *Fuller v. Benett* (1) and *Rolland v. Hart*. (2)

BATESON J. There remain the questions which I reserved for argument, as to whether the defendants can escape liability on the ground that the plaintiffs knew of the dangerous condition of the berth or knew of the terms of a notice by the defendants excepting them from liability. I think the defendants fail on these points also.

It is not contended that the plaintiffs had knowledge otherwise than by the employment as ship's agent of the defendants' harbour master who knew, or ought to have known, both the danger and the terms. The harbour master was not employed as a general agent by the plaintiffs, but only for a very limited purpose—namely, to report the ship at the Custom House, pay the pilot, and provide the master with money to pay the labourers. I think the harbour master collected the labour—or more probably the labour collected itself—on the wharf, and he sent the labourers down to the ship to get the job. The account for his services is made up of some small sums for telegrams, payment of the pilot, and the money advanced to the master to pay for the labour, together with one guinea for agency services.

Mr. Schiller put his argument in a very short form. His case was that the harbour master knew, and was, in fact, the agent of the ship; and that the knowledge of the agent

(1) (1843) 2 Hare, 394.

(2) (1871) L. R. 6 Ch. 678.

1929

THE
HAYLE.
Bateson J.

of the ship must be imputed to the plaintiffs as principals. He put it that the harbour master ought to have known—even if he did not know—the actual condition of affairs and also the terms of the card, called a “notice,” to the master, owners and persons in charge of vessels. Mr. Schiller argued that it did not matter whether the case was founded in tort or contract—the same principle must apply. He was rather inclined to think it was contract. He said that the contract was only made when the ship came alongside and not before. The object of that argument no doubt was to get rid of certain letters which had been written before the vessel came to the wharf; and he contended that the knowledge which the harbour master had was to be imputed to the plaintiffs. He referred me to *Indermaur v. Dames* (1), and in particular to the following passage from the judgment of Kelly C.B., quoting from the judgment of Willes J. in the Court below: “We consider it settled law that he”—a visitor unacquainted with the danger he is likely to incur—“using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact.” Mr. Schiller also referred to *In re Fenwick, Stobart & Co., Ltd.* (*Deep Sea Fishery Co.’s claim*), (2) a case of a secretary acting in a dual capacity, where it was held by Buckley J. that the secretary’s knowledge, as regards the affairs of one company, did not affect with notice the other company of which he was also secretary. The particular passage relied on was: “What the Court has to see is whether the information he gets, as secretary of the one company, comes to him under such circumstances as that it is his duty to communicate it to the other company. Suppose, for instance, as secretary of the first company he learns something which it would be a breach

(1) (1867) L. R. 2 C. P. 311, 313.

(2) [1902] 1 Ch. 507, 511.

of his duty to that company to communicate to the other company, I should say certainly that is not notice to the other company." It depends, therefore, on the circumstances of the case what the position really is. Mr. Schiller also cited *Forbes, Abbott & Lennard, Ltd. v. Great Western Ry. Co.* (1) with reference to the terms of the notice in order to show that the terms of this notice were wide enough to protect the company in every possible event.

Mr. Dunlop's case was that the harbour master did not in fact know; he said in terms, in his evidence, that the berth was safe; therefore he did not know that the berth was unsafe; and facts which he ought to have known, but did not know, did not affect the plaintiffs. His principals—if they were principals to this extent—would not be affected with matters which he ought to know, but which he, in fact, did not know, and (as far as the berth's unsafe condition was concerned) as the harbour master did not know it was unsafe, the plaintiffs certainly would not be affected with any knowledge of the unsafety of the berth. Mr. Dunlop also contended that the harbour master did not really know the contents of the notice, and that there was no evidence that he had ever read the notice. I do not think, in fact, there was any evidence that he had read it. My own view is that if he had ever read it he had forgotten all about it until the accident happened, and then, after the accident had happened, he handed to the master a card with the terms on it. Mr. Dunlop also said that there were two factors which are always necessarily present before knowledge of an agent can be considered to be knowledge of the principal, and he referred me to Bowstead's Law of Agency, 7th ed., pp. 366-7: "Knowledge acquired by an agent otherwise than in the course of his employment on the principal's behalf, or of any fact or circumstance which is not material to the business in respect of which he is employed, is not imputed to the principal."

Applying those principles to the present case I think it may be said that the harbour master was not the agent of

1929

THE
HAYLE.

Bateson J.

(1) (1927) 17 Asp. M. L. C. 347.

1929

THE
HAYLE.
Bateson J.

the plaintiffs to know these matters. I doubt myself whether the harbour master really had any duty to know what was the precise condition of this berth. The engineering department of the railway company was responsible for seeing that the berth was safe. The harbour master had general supervision of the wharf and did apparently report whether the time had arrived, or was about to arrive, when some cleaning of the berth should be done, but as to his knowledge of the condition of the berth or its fitness to receive a ship at different times, I doubt very much whether he was the person who was in a position to know what was the condition of things. But, however that may be, I am satisfied that his employment by the plaintiffs was merely for the purposes of reporting the ship and providing funds for the labour, and that he was not an agent to know these matters that are relied on in this case. Further than that, the harbour master was very much interested in getting the ship to come to this particular berth, and it was certainly not to his interest to prevent her coming. In that connection Mr. Dunlop referred me to a passage in *In re David Payne & Co., Ltd.* (1) Buckley J. (as he then was) said: "I understand the law to be this: that if a communication be made to an agent which it would be his duty to hand on to his principals, who in this case, of course, were the Board, of which Kolekmann was but one member, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose, and which he did not disclose."

Lastly, Mr. Dunlop referred to *Nelson Line v. James Nelson & Sons, Ltd.* (2), with regard to the question of the terms of the notice, and with regard to the notice itself, even assuming that it could be held that the plaintiffs had no notice of the terms. Mr. Dunlop pointed out that before the ship went to this berth the plaintiffs had written to the harbour master to

(1) [1904] 2 Ch. 608, 611.

(2) [1908] A. C. 16.

inquire whether the berths at the wharf were always safe for steamers to lie aground, and had received from him a letter stating that the berths were "perfectly safe for steamers to lie aground." Those letters were written, I think, before any contract was made for the ship to take the cargo to the wharf, in order that the plaintiffs might decide whether they should enter into the contract or not, and that letter of the harbour master no doubt was part of the inducement which led the plaintiffs to make their contract with the railway company to send the ship there. In my view those letters are part of the bargain between the railway company and the plaintiffs for taking the ship to this wharf. There is, therefore, a notice in writing to the plaintiffs by letter, which says that the berths are perfectly safe for steamers to lie aground, and a printed notice which conveyed words to the opposite effect. In that connection Mr. Dunlop cited in *Nelson Line v. James Nelson & Sons, Ltd.* (1), this passage from Lord Loreburn's speech: "If I were obliged to affix a definite meaning to the disputed language, I should prefer the plaintiffs' construction. But in truth I think the clause, taken as a whole, so ill-thought-out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care." That, of course, was a damage to cargo case, but it seems to me that the words there are equally applicable to a case like the present, where there is a duty on the defendants to take reasonable care: "They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different. As Lord Macnaghten said in *Elderslie Steamship Co. v. Borthwick* (2), 'an ambiguous document is no protection.'" I was also referred in this connection to *Aktieselskabet Dampskibet Forto v. Orkney Harbour Commissioners*. (3) Lord Salvesen in that case, dealing with the

1929

THE
HAYLE.

Bateson J

(1) [1908] A. C. 15, 19.

(2) [1905] A. C. 93, 96.

(3) 1915 S. C. 743, 755.

1929

THE
HAYLE.
Bateson J.

notice of the harbour commissioners to masters of vessels and others making use of the moorings laid down by the commissioners, said: "Even if the notice applied, I doubt whether it would relieve the defenders as in a question with the owner of a ship who was not familiar with its terms, even although the local pilot whom he employed was in knowledge of it. To have this effect in law it would require to be pleaded as a condition of the invitation which the harbour authorities impliedly issue to all vessels having occasion to use the harbour; and such a condition could not be imported in the case of a person who was not made aware of it. The pilot was not the servant of the shipowner in the sense of making his knowledge on such a subject the shipowner's knowledge. He was a mere agent for the limited purpose of navigating the entrance to the harbour. The conclusive answer, however, seems to me to be (as indeed the history of the notice shows) that it applies only to buoys and moorings which vessels make use of by attaching themselves to them." There he deals not only with the notice, but with the other point as to a person being an agent for a limited purpose.

I think this notice was no part of the contract as between the plaintiffs and the defendants, and that the defendants fail on this point also. I therefore give judgment now for the plaintiffs, subject to a reference.

Solicitors for the plaintiffs: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the defendants: *Godfrey Warr, Clarkson & Co.*

E. C. M. T.

THE NORMANSTAR.

1929

June 10.

Shipping—Assessment of Damages—Taxation of Costs—Claims proved by Average Statement—Fee allowed to Average Adjuster.

On a reference to assess damages arising out of a collision in the River Plate, the claims of cargo owners against the fund paid into Court by the owners of the wrongdoing ship, who had limited their liability, were presented to the registrar in the form of an average statement. On taxation, a fee of 1000*l.* was allowed to the average adjusters in respect of the preparation of the claims.

On a summons to review this item :—

Held, that where, as in the present case, there were a number of claims to be dealt with, an average statement was a method of proof to which there was no objection in principle, involving as it did less expense than would be incurred in the preparation of many affidavits or in calling a number of witnesses from overseas ; that it was irrelevant that the claimants had employed the same adjusters to prepare their claims in general average against underwriters ; and that the fee of 1000*l.* was rightly allowed.

APPEAL SUMMONS adjourned into Court for judgment.

The plaintiffs, the Union Cold Storage Company, *Ld.*, owners of the steamship *Normanstar*, sought an order to review an item in the bill of costs of the defendants, the Bank Line, *Ld.*, owners of the steamship *Kumeric*. The *Kumeric* and the *Normanstar* came into collision in the River Plate, and the *Normanstar* was subsequently found alone to blame.

Limitation proceedings on behalf of the *Normanstar* were instituted, and her owners obtained the usual decree limiting their liability to 8*l.* per ton on the registered tonnage of the *Normanstar* ascertained in accordance with the provisions of the Merchant Shipping Acts. The *Kumeric* was so seriously damaged in the collision that she sank on the mud and great damage was thereby occasioned to her cargo, the various owners of which presented claims against the limitation fund. These claims, which were dealt with by the registrar and allowed at 328,134*l.*, were prepared by a firm of average adjusters and were presented to the tribunal in the form of an average statement.

On the taxation of the claimants' bill of costs the owners of the *Normanstar* (plaintiffs in the limitation proceedings)

1929

THE
NORMAN-
STAR.

objected to an item of 1312*l.* 10*s.* charged by the adjusters in respect of the preparation of the claims, on the ground that it was work which the adjusters would have to do in the ordinary course of preparing their adjustment for purposes of general average. The assistant registrar allowed a fee of 1000*l.*

The plaintiffs appealed.

Lewis Noad for the plaintiffs.

Alfred Bucknill for the defendants (claimants).

Cur. adv. vult.

June 10. HILL J. This was an objection to the taxation of the bill of costs following a report on a reference by the plaintiffs in a limitation action, who had been defendants in the damage action in which they were found to blame and had to pay the damages suffered by the steamship *Kumeric* and by the cargo laden on board her. The objection is to an allowance in the assistant registrar's taxation in respect of a fee paid to well known average adjusters for preparing particulars.

Where there is a decree of limitation of liability the party obtaining the decree and liable for the damages limited by the decree has in general to pay the costs of the reference, and these costs include the costs of the several creditors incurred in proving the amount of the damages suffered by them. That is obviously just. It would be strange if the wrongdoer could say to the injured parties "here is the lump sum for which I am liable to you ; now find out at your own expense to how much of it each is entitled." Each claimant on the reference must prove the amount of his loss. Where there are a number of cargo claims and also a ship's claim it is very often found convenient to prove the claims by affidavit, as the rules permit. Frequently, where the claims have been put into the hands of an adjuster, and he has investigated them, the results, asset out in his adjustment, are accepted without incurring the expense of filling affidavits with the relevant vouchers. When that practice is followed

it relieves the claimant's solicitors from personally preparing the affidavits and vouchers, and getting them sworn, and it presents the evidence to the registrar in a very convenient form. In general, where there are a large number of items to be proved, it is, I am satisfied, a course which involves less expense than the preparation and swearing of a number of affidavits.

In the present case there were many items of damage to be considered. The ship was sunk and salvaged; the cargo was in part lost, in part salvaged and reconditioned; there were salvage and other expenses to be ascertained and distributed among the several claimants before the amount of damage suffered by each could be proved, and the loss of each several claimant had to be proved. The solicitors for the cargo claimants, instead of doing all this work themselves, employed, as I think wisely, a well known firm of adjusters to ascertain the facts and set them out in a statement. A separate statement was prepared by the adjusters—and no doubt incorporated in the first statement I have referred to—dealing separately with charges and expenses, the proceeds of unidentified salvage cargo, and their appropriation to the several parcels belonging to the different claimants; and there was also a separate statement of the general suing and labour expenses and charges. All those were by agreement treated as the evidence in the reference in lieu of affidavits and vouchers. The adjuster attended the reference to give explanations. The registrar on the basis of the statement arrived at the figures in the report. The ship's loss worked out at 26,453*l.* and the aggregate of the cargo losses at 328,134*l.* Then came the taxation. The solicitors' costs for instructions for brief had been carried in at the very moderate figure of 157*l.* 10*s.*—properly so, for they had employed the adjusters to prepare the particulars. Of that 126*l.* was disallowed. Had they done all the work no one can doubt that a very much larger sum would have been claimed and allowed for instructions for brief. The adjuster's fee was originally put in as 1575*l.*, but that was amended to 1312*l.* 10*s.*, and the assistant registrar allowed 1000*l.*

1929

 THE
NORMAN-
STAR.
HILL J.

1929

THE
NORMAN-
STAR.
HILL J.

In principle I can see no possible objection to such an allowance. The adjusters have done for the claimants work which the claimants' solicitors would otherwise have had to do, and the result has been that the facts and figures set out in the adjustment have been accepted in evidence. Had that course not been followed, the claims could only have been proved by bringing a large number of witnesses from the River Plate, or by a great number of affidavits, mostly sworn in the Plate, with the appropriate vouchers annexed, supplemented by evidence, which might have been very lengthy, as to the appropriation of the salvage and other charges to the respective items of ship and each parcel of cargo. It is not for me to question the quantum allowed. But I have little doubt that the cost of so preparing the brief and proving the claims would have largely exceeded the aggregate of the 1031*l.* 10*s.* allowed by the assistant registrar.

The appellants seem to think it is relevant that the claimants may have employed the same adjusters to prepare their claim against the underwriters. I cannot see the relevance. It is true that an adjustment as against underwriters must first of all ascertain the amount of the respective losses. So far it proceeds in the same way. Then the adjusters have to ascertain the respective insurances and underwriters, and have to distribute the losses according to the amounts insured among the underwriters, and so ascertain what each underwriter has to pay and to whom he has to pay it. This second half of an adjustment against underwriters is irrelevant to any inquiry against the wrongdoer. But this second half is not included in the adjusters' fees charged in this case. I may add that it is a fallacy to suppose that the adjusters are employed by the underwriters. I dismiss the appeal with costs.

Leave to appeal.

Solicitors for the plaintiffs : *Wm. A. Crump & Son.*

Solicitors for the defendants : *Ince, Colt, Ince & Roscoe.*

E. C. M. T.

THE PRINCESS.

1929

June 25, 26;
July 23.

Shipping—Damage—Anchor Light—Dumb Barge moored alongside Vessel at Tier—Barge unattended—Port of London River Bye-laws, 1914-1926, By-law 14.

The plaintiffs' steamship *S.* was lying moored at a tier on the south side of the River Thames. The defendants' dumb barge *P.* was lying inside of the *S.* and attached to her by ropes fore and aft. When the work of receiving cargo from the *S.* ceased for the day the *P.* was left alongside the *S.* unlighted and unattended. The *S.* was exhibiting the usual anchor light. During the night some unknown craft came into collision with the *P.* and she filled and sank, and, as the tide ebbed, the *S.* rested on the submerged hull of the *P.* and both vessels were damaged.

Under by-law 14 of the Port of London River Bye-laws, a vessel under 150 feet in length "when at anchor or moored" by night must exhibit a riding light; but by proviso (a) to the by-law: "Where masted vessels are lying made fast at the moorings in the tiers, only the outermost off shore of such vessels in each tier shall be required to exhibit the riding light"; and by proviso (c): ". . . Lighters made fast at wharves, piers or jetties or alongside vessels thereat, shall not be required to exhibit the riding light":—

Held (i.), that it was not negligent to leave the *P.* unattended; but (ii.), that not being a masted vessel nor made fast to a vessel at a wharf, pier or jetty, the *P.* could not bring herself within either proviso (a) or (c); (iii.) that accordingly there was nothing to take her out of the obligation imposed upon her under the main part of the by-law to exhibit a riding light; and (iv.) that, as the defendants could not prove that the absence of the light was not a cause of the collision with the unknown craft, they failed to discharge the onus upon them, and there must be judgment for the plaintiffs.

ACTION OF DAMAGE.

The plaintiffs were the owners of the steamship *Stork*; the defendants were the owners of the dumb barge *Princess*.

Shortly before 3 A.M. on October 22, 1926, the *Stork* was lying moored at Mill Stairs Tier, River Thames, heading down-river. The weather was fine and clear and the tide ebb. The *Stork* had on the previous day been discharging her cargo of asphalt into lighters and when work ceased on that day the *Princess* was left unattended and partly loaded alongside the *Stork* and made fast to her on the starboard side. The *Stork* had a skeleton crew on board and no steam on her main engines. The regulation lights for a steamship

1929

 THE
PRINCESS.

at anchor were being duly exhibited on the *Stork*, but there was no light on the *Princess*.

In these circumstances the mooring ropes of the *Princess* parted and she rapidly filled and sank apparently well clear of the *Stork*. As the tide fell the *Stork* took the ground and when she was no longer waterborne it was ascertained that she was resting upon the submerged hull of the *Princess*. Both vessels were damaged and the *Princess* became a constructive total loss.

The defendants alleged that the damage was an inevitable accident so far as they were concerned and could not have been avoided by the exercise of ordinary and reasonable care. They alleged in the defence that the *Princess* sank owing to some cause unknown to them, but at the hearing they adduced evidence to prove that some craft must have collided with the *Princess* and holed her so that she sank. There was no counterclaim.

Dunlop K.C. and *Owen Bateson* for the plaintiffs. The onus is on the defendants of proving inevitable accident (see *The Merchant Prince* (1)), and if in fact some craft collided with the *Princess* it is for the defendants to show that they did not cause or contribute to that collision. The *Princess* ought to have had a man in charge of her and ought to have been exhibiting a riding light: *The St. Aubin*. (2)

Batten K.C. and *Dumas* for the defendants. It was not negligent, under the circumstances, to leave the *Princess* unattended. Further, by proviso (a) to by-law 14 of the Port of London River Bye-laws, "where masted vessels are lying made fast at the moorings in the tiers, only the outermost off shore of such vessels in each tier shall be required to exhibit the riding light"; a fortiori, therefore, a dumb barge made fast inside a steamer moored at a tier is not required to exhibit a light: see also proviso (c).

In *The St. Aubin* (2) the facts were very different, the unlighted and unattended barge was allowed to swing athwart the river at tide time.

Cur. adv. vult.

(1) [1892] P. 179.

(2) [1907] P. 60.

July 23. HILL J. read the following judgment : This case involves a claim for damages for negligence by the owners of the steamship *Stork* against the owners of the dumb barge *Princess*. The *Stork* was a vessel of 2029 tons gross, and 270 feet long. She was lying moored at Mill Stairs Tier in the River Thames, heading down river, part laden.

1929
THE
PRINCESS.

The *Princess* was a steel dumb barge of 130 tons carrying capacity, 74 feet long, and on the day preceding the damage to the *Stork* she was lying alongside the *Stork*, on the *Stork's* starboard side, heading up river : that is to say, the *Princess's* starboard side was alongside the *Stork's* starboard side. The *Princess* was attached to the *Stork* by ropes fore and aft and breast ropes. The *Princess* had come there on the afternoon of October 21, 1926, and had received part of a cargo of asphalt from the *Stork*. At 5 o'clock in the afternoon she had about forty tons in her in the after part. Work for the night then ceased and the lightermen left the *Princess* there. During the night she carried no light and she had no one on board. High tide was at 2.17 A.M. on the following morning. Some time during the night the *Princess* sank, and as the tide fell the *Stork* rested upon her, and both vessels received damage. The plaintiffs sue the owners of the *Princess* for the damage.

Now a barge ought not to sink and get into such a position that a steamer alongside of her sits on her. That she got into such a position is, I think, prima facie evidence of negligence. The *Stork* had no steam and could not remove herself in time, even although those on board had known that the *Princess* had sunk in dangerous proximity to the *Stork*. Prima facie, therefore, there is evidence that the damage to the *Stork* was due to negligence for which the defendants were responsible. That has shifted the burden on to the defendants.

The defendants contend that this sinking was without negligence on their part. As they were bound to do, they set out to prove what was the cause of the sinking. Unless they did that they could not say that there was no negligence on their part. I find that the incursion of water

1929
THE
PRINCESS.
HILL J.

was due primarily to damage to the *Princess*, as described in the survey reports. The damage to the *Princess* was on the port side two feet forward of the cabin bulkhead. What was the cause of this damage? I am advised, and I entirely agree, that it must have been sustained when the *Princess* was afloat, and by some other vessel striking the *Princess*. No one, except the man who did the mischief, knows what vessel struck the *Princess*—and possibly he does not know. But it is, as I find, certain that some vessel did strike the *Princess*. I accept the evidence that up to 5 P.M. the damage did not exist. Another barge in the barge tier near by was broken adrift during that night. The watchman of the *Stork* did see a tug and tow which passed, forcing her way through the craft in that neighbourhood, and it may be that the craft was driven against the *Princess*. At any rate some vessel during that night was carelessly handled in the neighbourhood, and the result was that something came into collision with the *Princess* and did her damage. The result of the damage to the *Princess* was that she made water and sank.

I therefore find that the incursion of water which caused the *Princess* to sink was by reason of collision with some unknown vessel or craft. That, however, does not completely discharge the onus which rests upon the defendants. They must further show that the collision and the sinking were without negligence on their part. The plaintiffs say that the defendants fail to do that for two reasons: (1.) that the barge ought to have had a man in charge, (2.) the barge ought to have been exhibiting a light. If either of these propositions is sound, then it is clear that the defendants cannot show that the sinking was without negligence on their part. If a man had been on board he might have given warning to prevent the collision; or he might shortly after the collision have discovered the leak caused by it and obtained assistance in order to remove the barge to a position where she would have sunk clear of the *Stork*. The damage was such that it must have taken a considerable time for sufficient water to enter and sink the barge. If

the barge had been exhibiting a light the collision might never have happened.

1929

THE
PRINCESS.
HILL J.

I am not able to find that it was negligence to leave the barge unattended. Whether, in river or in dock, a barge ought to be attended depends in each case on the particular locality and time and the other circumstances of the particular case. The *Princess* was fast fore and aft alongside the *Stork* in the tier. She was on the side of the steamer remote from the main traffic of the river. There might be some traffic on the south side between the barge tiers and the steamer, or in or out of St. Saviour's dock. But St. Saviour's dock is only a small inlet, and the traffic was not likely to be considerable; nor was there any reason to expect that such traffic as there was would not keep clear of the steamers at the tier and craft moored alongside them. I have asked the Elder Brethren for their view. They are of opinion that it was not improper to leave the barge unattended. I am of the same opinion.

But that still leaves the question of the light, and that depends on the Port of London Bye-laws—No. 14. The first part of by-law 14 provides as follows: "A vessel under one hundred and fifty feet in length when at anchor or moored shall, by night, exhibit forward where it can best be seen but at a height not less than ten feet and not exceeding twenty feet above the hull a white light (hereinafter called the riding light) in a lantern so constructed as to show a clear, uniform and unbroken light visible all round the horizon at a distance of at least one mile. Provided that in the case of a lighter the riding light may be placed on the highest available part thereof." That applies to the *Princess*. She was a vessel: she was moored; she was moored fore and aft to the *Stork*, which was herself moored fore and aft. So far, therefore, the rule would impose upon the *Princess* the obligation to exhibit a riding light. But there are certain provisos to the by-law. Proviso (a) is as follows: "Where masted vessels are lying made fast at the moorings in the tiers, only the outermost off shore of such vessels in each tier shall be required to exhibit the riding light." The *Princess* was not a masted vessel. Then proviso (c) reads as

1929

THE
PRINCESS.

Hill J.

follows : “ Lighters riding at the usual barge moorings in the river above Gravesend, and lighters lying made fast at wharves, piers or jetties or alongside vessels thereat, shall not be required to exhibit the riding light.” The *Princess* was not lying at any usual barge mooring, nor was she made fast to a wharf, pier or jetty, nor was she alongside a vessel at a wharf, pier or jetty. There is, therefore, nothing to take the *Princess* out of the obligation imposed upon her by the rule, to exhibit a riding light on her highest available part. She had no light. Disobedience to the rule is negligence.

The defendants cannot prove that the absence of a light was not a cause of the collision. They fail to discharge the onus which is upon them, and therefore there must be judgment for the plaintiffs.

Solicitors for the plaintiffs : *Batham & Greig.*

Solicitors for the defendants : *J. A. & H. E. Farnfield.*

E. C. M. T.

THE TOVARISCH.

1929

July 3, 4, 5,
8, 10, 25.

Shipping—Collision—Flare-up Light—Green pyrotechnic Light—Regulations for Preventing Collisions at Sea, 1910—Sailing Ship navigated from Bridge Forward of Poop.

The phrase "flare-up light" in the Regulations for Preventing Collisions at Sea, 1910, means a light produced by setting fire to something which will burn with an ordinary flame and does not include coloured flames. The exhibition, therefore, of a green pyrotechnic light is not authorized by art. 12 under which a vessel "may, if necessary in order to attract attention . . . show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal."

Observations on the undesirability of directing the navigation of a sailing ship from a bridge forward of the poop on which the men at the wheel are stationed.

ACTION OF DAMAGE.

The plaintiffs were the owners of the Italian steamship *Alcantara*; the defendants were the owners of the Russian sailing ship *Tovarisch*. About 8 P.M. on February 24, 1928, the *Alcantara*, when off Dungeness, on a voyage from Sicily to Calais with a cargo of ore, was run into and sunk with the whole of her crew of twenty-three hands except one man by the *Tovarisch*, a four-masted barque used as a training ship for cadets for the Russian mercantile marine. Shortly before the collision a green pyrotechnic light was burnt on the starboard side of the bridge of the *Tovarisch*.

Langton K.C., E. Aylmer Digby K.C. and Cyril Miller for the plaintiffs.

Dunlop K.C., Stranger and Krougliakoff for the defendants.

[The arguments on the question whether the exhibition of the green pyrotechnic light was justified under the Regulations for Preventing Collisions at Sea are fully set out in the judgment. *The Main* (1) and *The Essequibo* (2) were referred to.]

Cur. adv. vult.

July 25. HILL J. read the following judgment: The vessels involved in this collision were the Italian steamship

(1) (1886) 11 P. D. 132.

(2) (1888) 13 P. D. 51.

1929

THE
TOVARISCH.
HILL J.

Alcantara and the Russian sailing ship *Tovarisch*. The collision happened on February 24, 1928. The *Alcantara* was a single screw steamship of 1682 tons gross, 289 feet long; she was laden with mineral ore, and manned by a crew of twenty-three hands all told. Her lights were electric. The *Tovarisch* was a four-masted barque of 2472 tons gross, 284 feet long; she was heavily ballasted, drawing 17 feet 2 inches forward and 18 feet aft. She was employed as a training ship for the Russian mercantile marine. Her crew was ninety-five hands all told, including about sixty cadets. Her lights were oil. The *Alcantara* was bound up Channel for Calais. The *Tovarisch* was bound down Channel after passing the South Foreland and Dover. The collision was in the neighbourhood of Dungeness, the defendants say about S.S.W. of Dungeness, and about three to four miles distant. The ships were in collision, the bowsprit and stem of the *Tovarisch* with the port side of the *Alcantara*. The *Alcantara* sank within a few minutes and all on board her were lost except one man who, at the moment of collision, was in the engine room, and who came on deck, and, as the *Alcantara* sank under the bows of the *Tovarisch*, caught hold of a chain attached to the bowsprit and ten minutes later was hauled on board the *Tovarisch*. It may be that nothing that could be done would have saved any others. But it is much to be regretted that the *Tovarisch* did not immediately bring herself to, as she could easily have done without risk to herself. She threw out life buoys, and prepared to lower boats and spoke another steamer, but by continuing on her course she was already far past the place of collision. The master and the third officer say they did not know that the *Alcantara* had sunk. But the lookout knew it; he had seen her go down. It is strange that the master should have made no inquiry as to the ship with which he had collided.

The fact that the plaintiffs are without any evidence, except that of the one survivor, who was in the engine room at the moment of collision, and had last been on deck some twenty minutes before, makes the case one of difficulty for

the plaintiffs, and also for the defendants, and still more for the judge. The plaintiffs called this witness (Pavon) and put in the log of the *Tovarisch* and certain answers to interrogatories. That was the plaintiffs' evidence as to the facts of the collision. The plaintiffs also called two surveyors. The defendants were able to call such evidence from the *Tovarisch* as they thought fit. They called the third officer, who was in charge of the watch, the master, who had been on deck when Dungeness was passed and came on deck very shortly before the collision, an A.B. and a cadet who were at the wheel, and a cadet who was on the lookout. These were the defendants' witnesses as to the facts of the collision. Two other men from the ship were called on the question of the efficiency of the *Tovarisch's* green light, as well as a Board of Trade inspector, and also a surveyor as to angle and speed. My task was not lightened by the fact that the bulk of the evidence of the defendants was given in Russian, and that there were evidently difficulties in interpretation. I would suggest that where witnesses are going to give their evidence in a foreign language through an interpreter it is very desirable that two interpreters should be employed so that they may work in relays. To try to interpret evidence for four or five hours a day must be trying work, and I would suggest that interpreters should be treated as shorthand writers are, by being permitted to work in relays.

[His Lordship then dealt with some of the evidence and found the following facts. The weather was hazy: the visibility of the *Alcantara's* lights was something between two-thirds of a mile and a mile, and it might be that the electric lights of the *Alcantara* were visible at a greater distance than the oil lights of the *Tovarisch*. The *Tovarisch's* green light was in accordance with the regulations. The wind was a moderate easterly breeze. Each vessel was making about $6\frac{1}{2}$ knots. The course of the *Tovarisch* was S. 60° W.; the *Alcantara's* course could not be precisely fixed, but it was something between N. 76° E. and N. 82° E. The *Alcantara* was struck on the port side abaft the engine room, and the

1929

THE
TOVARISCH.
HILL J.

1929

THE
TOVARISCH.
HILL J.

angle of the blow was not less than 45° and not more than 63° .]
His Lordship continued as follows :—

I am advised that in the weather which prevailed neither ship can be found guilty of proceeding at excessive speed. I agree. Nor am I able to find that the collision was due to bad lookout on either vessel. At the same time I am advised that the navigating officer of the *Tovarisch* was not in anything like so good a position as he would have been had he been, as is usual in sailing ships, on the poop. He was not in a position to keep an effective lookout, or have a clear view along the side of the ship. Moreover, he was in a very bad position for giving helm orders, and seeing that they were understood and carried out. The owners of the *Tovarisch* have placed a bridge athwartships a little abaft of the second main mast and abreast of its rigging. The wheel is in the usual position, on the poop aft ; it is about 72 feet abaft the bridge. The navigating officer keeps his watch on the bridge ; he shouts his helm orders to the men at the wheel ; to give his orders he must turn round towards them, and for the moment cease to look out himself and have his back to the lookout man stationed on the forecastle head ; at night, at any rate, he cannot see what the helmsmen are doing and the helmsmen cannot see him and, if they make a mistake, he cannot instantly be aware of it and correct it. I am advised that with these arrangements the ship was not under proper control.

Before I deal with the manœuvres, it will be well to consider a question of law. The third officer of the *Tovarisch* burned a green pyrotechnic light, holding it out from the starboard side of the bridge. It is spoken of in the pleadings as a green flare. Specimens were produced in Court—ordinary green and red pyrotechnic lights. The *Tovarisch* carried a supply of such lights—kept on the bridge—and from time to time they were used. The defendants say this was a light authorized by the regulations. If authorized it must be by art. 12. “ Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal.” Art. 31 includes among

distress signals "flames on the ship (as from a burning tar barrel, oil barrel, etc.)." I am not, for the moment, concerned with the condition, "if necessary in order to attract attention." I am concerned with the meaning of "a flare-up light." The defendants say it may be of any colour, shown from any part of the ship. I cannot agree. In my opinion, in the language of the sea it means a light, which is not in a lamp, and is produced by setting fire to something which burns with an ordinary flame, and does not include specially coloured flames. So also the Elder Brethren understand by a flare-up light an ordinary flame.

So far as the regulations are concerned the phrase "flare-up" or "flare-up light" is, I believe, found for the first time in the regulations of 1863. In 1863 I doubt if pyrotechnic coloured lights of the kind now held in one's hand were known. I have traced the history of "flare-up" or "flare-up light" in the regulations. In 1910 the phrase occurs in art. 8 (pilot vessels), art. 9 (*d*) and (*f*) (fishing vessels), art. 10 (overtaken vessel), and art. 12.

Art. 12 first appeared in the regulations of 1896 (where also it was art. 12). Art. 10 first appeared in the regulations of 1880 (as art. 11) and was repeated in the regulations of 1884 and the regulations of 1896. There was no corresponding article in the regulations of 1863. The second paragraph was added first in the regulations of 1896; it is stated by Mr. Marsden in the 5th edition (1904) of *Collisions at Sea*, that it was added because doubts had been expressed as to the legality of carrying a fixed stern light: see *The Imbro*. (1) Art. 9 relates to the lights of fishing vessels and fishing boats; it is a tedious task to trace the history of this regulation. The rules as to fishing vessels have been altered so often and, when issued, suspended. Art. 8 relates to pilot vessels, and corresponds with 8 of the regulations of 1896, 9 of 1884 and 1880, and 8 of 1863.

In art. 12 the phrase has always been "show a flare-up light . . . that cannot be mistaken for a distress signal." In art. 10 the phrase has always been "a white light or a flare-up light." The power to carry the white light fixed

(1) (1889) 14 P. D. 73.

1929

THE
TOVARISCH.
Hill J.

1929
THE
TOVARISCH.
Hill J.

and screened has existed since 1896. As to art. 8, various additions were from time to time made in regard to the lights to be carried, but the phrase as to flare-up lights has been constant. It is the first paragraph of art. 8: "Shall carry a white light at the masthead visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes." (In 1863 it was "every fifteen minutes.") It will be noticed that this regulation also provides for the flashing or showing of side lights so as to indicate the direction in which the pilot vessel is heading. This first appeared in 1896. As to art. 9 the phrase a "flare-up" first occurs (so far as I have been able to ascertain) in the regulations of 1863, art. 9, which relates to open fishing boats and other open boats. It provides that if they do not carry side lights they shall carry a lantern with green and red slides, and exhibit it in sufficient time to prevent collision, so that the green light is not seen on the port side nor the red light on the starboard side. It then provides for a bright white light, when the vessel is at anchor or attached to her nets and stationary. And it adds "fishing vessels and open boats shall, however, not be prevented from using a flare-up, in addition, if considered expedient." For this was substituted art. 10 of 1880, which added to the regulations of 1863 by making special provisions as to trawlers and vessels engaged in drift net fishing, repeating in nearly the same words the permission as to flares. "Fishing vessels and open boats shall not be prevented from using a flare-up in addition if they desire to do so." Art. 10 of the regulations of 1884 (September, 1884) repeated with modifications art. 10 of 1880 and retained the provision as to flare-ups in the following words: "Fishing vessels and open boats may at any time use a flare-up in addition to the lights which they are by this article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag net, shall be shown in the after part of the vessel excepting that, if the vessel is hanging by the stern to her trawl, dredge, or drag net, they shall be exhibited from the bow." A regulation of December, 1884,

added special provisions as to steam trawlers and sailing trawlers prescribing the lights to be carried by them. A further Order in Council of June 24, 1885, altered the regulation of December, 1884, so far as related to British sailing vessels engaged in trawling, and gave them an option of carrying a white light visible all round the horizon and also "a sufficient supply of red pyrotechnic lights which shall each burn for at least thirty seconds," and directed that "one of the pyrotechnic lights shall be shown on approaching, or on being approached by, another ship or vessel in sufficient time to prevent collision." This I believe to be the only reference to pyrotechnic lights in the regulations. They were used under that regulation, and an instance of their being used may be found in *The Orion*. (1) Then came the regulations of 1896, and they postponed the question of fishing vessels' lights to a subsequent Order in Council: see Marsden, 5th ed., p. 506. Finally, the whole set of regulations as to fishing vessels was recast by an Order in Council of April 4, 1906, in art. 9, which is set out in Marsden, 6th ed., p. 353. Pyrotechnic red lights have disappeared. The provision as to sailing vessels engaged in trawling is art. 9 (d) (2.): ". . . shall carry a white light in a lantern" visible "all round the horizon and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision." Art. 9 of 1910 repeats art. 9 of 1906. Art. 9 (f) repeats in slightly different terms the permission which had existed since 1863 to use a flare-up light. The words are: "(f) fishing-vessels and fishing-boats may at any time use a flare-up light in addition to the lights which they are by this article required to carry and show."

Looking at the regulations considered as a whole, from one end to the other of them, there is in my view nothing to justify the display of a red or green pyrotechnic light. Red pyrotechnic lights are only once mentioned and then are taken out of the regulations. "Flare-up" or "flare-up light" is preceded only once by an adjective, "white,"

(1) [1891] P. 307.

1929
THE
TOVARISCH.
HILL J.

1929
 THE
 TOVARISCH.
 HILL J.

and that is in a rule relating to sailing trawlers which substituted a flare-up light for a red pyrotechnic light. The phrase "a flare-up" or "flare-up light" has appeared in the rules since 1863. Since 1863 it has been used in the regulations relating to "fishing vessels and open boats," and in the regulations relating to pilot vessels. Since 1880 it has been used in the regulations relating to an overtaken vessel. Since 1896 it has appeared in art. 12, which authorizes its use "if necessary in order to attract attention." Mr. Marsden, in his 5th edition (1904), in regard to art. 12, says (p. 364): "the flare-up light intended by the article, presumably, is that in common use; and care must be taken that, if any of the modern pyrotechnic lights are used, they are such as cannot be mistaken for other lights prescribed by the regulations." This passage has been repeated by later editors.

Test the matter by art. 10. If the defendants' contention is right the overtaken vessel may show a red or a green light from her stern. It is absurd to suppose that the regulations have that effect. Test it again by art. 9 (f)—the result is nearly as absurd. A fishing vessel which is bound to carry the white light prescribed, or, if a steam trawler, a screened tri-colour lantern, may also burn a coloured light visible all round the horizon from any part of the vessel. I hold that "flare-up light" means an ordinary flame and not a specially coloured flame. My only doubt is whether what is called a blue pyrotechnic light is permissible—it burns with the effect of a more penetrating light, which is nearer a pure white than the yellow of ordinary flame. I do not decide that. But of this I am satisfied: the words "flare-up light" include neither a green flame nor a red flame. To hold otherwise would be to invite confusion and disaster. Flare-up lights are not screened, and show all round the horizon. If the defendants' contention were right, a green pyrotechnic light, or a red, might be burned on either side of the ship, or at the stern, or in the bows, from whatever direction the other ship was approaching, and whether she was meeting, crossing, or overtaking. The lights prescribed by the regulations for the

Tovarisch were the red and green side lights, i.e., lights in lanterns properly screened. If it was necessary in order to attract attention, she was entitled to show something which burned with an ordinary flame. It was a breach of the regulations to exhibit a green pyrotechnic light.

I now return to the defendants' narrative, and (inter alia) have to consider whether that breach caused or contributed to the collision. The story of the third officer and of the answers to interrogatories which the plaintiffs put in is as follows: the *Tovarisch* saw both side lights of the *Alcantara* one and a half to two points on the starboard bow at an estimated distance of about a mile and, about a minute later, at an estimated distance of half to three-quarters of a mile, lost the red and had only the green light about two points on the starboard bow. Upon this the helm was ordered hard-a-starboard, and the third officer took from his pocket a green pyrotechnic light and lit it and held it out from the starboard wing of the bridge. About half a minute later the red light of the *Alcantara* reopened and a short blast was heard. Upon this the order "hard-a-port" was given. Two turns of the wheel had been carried out under the order hard-a-starboard, and under the order hard-a-port the wheel was put right over before the collision. According to the answer put in, the green pyrotechnic light was burned right up to the collision, but according to the evidence of the third officer it was dropped when the order hard-a-port was given. The third officer said there was a misunderstanding in the answer. After the red light of the *Alcantara* opened, her green light was shut and a second faint short blast heard. According to the evidence the order hard-a-port was given one minute or a little more before the collision. We thus have the green light of the *Tovarisch* right ahead of the *Alcantara*; the *Tovarisch* passes on to the starboard bow of the *Alcantara* and the vessels are green to green; the *Tovarisch* begins to alter to port, and burns the green light. The *Alcantara* ports or hard-a-ports with a short blast and opens the red light; the *Tovarisch* hard-a-ports; the *Alcantara's* green light is shut in. The collision follows in a minute or rather

1929

 THE
 TOVARISCH.
 HILL J.

1929

THE
TOVARISCH.
HILL J.

more. I accept Pavon's evidence that he had shut off steam and stopped the engines before the collision; his estimate of time was one minute. He had heard a blast of his own whistle before that; he did not know what it was; his estimate of time was four minutes before the collision. After his experiences, too much reliance cannot be placed on his recollections of intervals of time, but he heard the blast before he received the order stop.

From these facts I conclude the following: (1.) The *Alcantara* when first seen had the *Tovarisch* right ahead and then had the *Tovarisch* showing a green light on the *Alcantara's* starboard bow, and the *Alcantara* was in a position to pass the *Tovarisch* green to green. There was no absolute need for the *Alcantara* to alter her course. On the courses if neither altered they would have passed with one to two cables between them. (2.) From the position of green to green the *Alcantara* did port or hard-a-port and alter her course to starboard. She must have altered to starboard to produce the angle of collision even if it be only 45 degrees. (3.) Before the collision the *Alcantara* did stop her engines, but she never reversed and she maintained her speed of six and a half or seven knots until the last minute or so. (4.) The *Alcantara* did not port or hard-a-port until after the *Tovarisch* had begun to show the green pyrotechnic light. According to the third officer's estimate of times the light had been burning half a minute before the *Alcantara's* red light reopened. (5.) The *Tovarisch*, immediately the red light of the *Alcantara* was lost, began to starboard and at the same time lit the green pyrotechnic light. (6.) The *Tovarisch*, immediately the red light of the *Alcantara* reopened, hard-a-ported and kept hard-a-port helm up to the collision.

It is clear from what I have said that the *Alcantara* attempted to cross what was in fact the heading of the *Tovarisch*. If she knew that she had a ship showing a green light on her starboard bow she was clearly to blame; she was guilty of a most foolish action. But she had had exhibited to her a brilliant pyrotechnic light. If she had already seen the green light of the *Tovarisch* the pyrotechnic light would

probably obliterate the feebler flame of the lantern. How the pyrotechnic light would show upon the sails is matter of conjecture. What was the *Alcantara* to think of it? I have asked the Elder Brethren. They say they would have regarded it as an imperative demand to take action—a warning to the *Alcantara* that she was doing something dangerous, and an urgent call to her to do something different. In these circumstances they are of opinion that the *Alcantara* could not be blamed for porting or hard-a-porting; so also with regard to the engines, they think the *Alcantara* cannot be blamed for stopping instead of reversing. The master of the *Alcantara* would be right if he thought “I may be wrong if I keep ahead, I may be wrong if I go astern; I will stop and see.” What the *Alcantara* did in fact contributed to the collision, but it was not the fault of the *Alcantara* that she did it. The burning of the green light was the cause, and was negligent, and the *Tovarisch* is to blame.

I should add that it would be difficult for the *Tovarisch* to justify the burning even of a flare of the ordinary kind. In the circumstances, if the vessels were green to green, it would be misleading, and if they were green to green it was unnecessary to attract attention, and the condition required by art. 12 did not exist. In one set of circumstances a flare might have been justified—namely, if the *Alcantara*, having originally had both her side lights open to the *Tovarisch*, had continued to keep them open, i.e., had continued to approach with risk of collision. But that is not the defendants’ case. If it had been, the starboarding of the *Tovarisch* must have been wrong beyond all doubt.

What I have said is enough to show that the plaintiffs have proved the *Tovarisch* to blame, and the defendants have not proved the *Alcantara* to blame. But, in case I am wrong about the green pyrotechnic light, it is well that I should deal with the other charges made by the plaintiffs against the *Tovarisch*. They are two. It is said the *Tovarisch* was wrong: (1.) to starboard; (2.) to hard-a-port. In the first instance when the *Tovarisch* saw the red and green of the *Alcantara* on the starboard bow the vessels

1929

THE
TOVARISCH.
HILL J.

1929
THE
TOVARISCH.
HILL J.

were approaching so as to involve at that moment risk of collision. It was the duty of the *Tovarisch* at that moment to keep her course and speed. Whether the *Tovarisch* was justified in starboarding immediately she lost the red light depends on whether the risk was finally at an end. The position was similar to that of steamships on crossing courses, where the duty of the stand-on ship to keep course and speed continues until the ships have definitely passed out of the phase of crossing ships: see *The Orduna*. (1) The Elder Brethren are of opinion that it was not right for the *Tovarisch* to starboard as soon as she did. It is a difficult question, and I need not decide it. But this, at any rate, seems clear. If the position of the ships was such that it was necessary to call attention it can only be because the ships are in such a position that there was still risk of collision. And either the *Tovarisch* ought to have kept her course or she ought not to have burned any sort of flare.

As to hard-a-porting of the *Tovarisch*, the Elder Brethren advise me, and I entirely agree, that it was the worst thing the *Tovarisch* could have done. She was called upon to act by the porting of the *Alcantara*. The men at the wheel were already putting the wheel to starboard and the *Tovarisch* had begun to swing. How much she had swung I am unable to say. I am unable to place too much reliance on the two men at the wheel, each of whom says he was doing the steering. But it was a substantial alteration. With the wind on her port quarter she could alter her heading more rapidly to port than to starboard. The third officer said that by hard-a-starboarding the helm he could get the sails shaking in one to one and a half minutes. In fact, though the helm was already partly over to starboard, there was time to get it right over to port before the collision. The head sheets could have been let go and that would have assisted the starboard helm. If the men were at stations—and Mr. Dunlop said there was no evidence that they were not—the yards could have been braced and the ship kept under control. But as there was a smooth sea and a moderate wind there

(1) [1919] P. 381.

was no danger in throwing the *Tovarisch* flat aback. I am advised that if the hard-a-starboard helm had been continued, the *Tovarisch* would very probably have brought herself parallel with the *Alcantara* and avoided the collision altogether. Sailing as she was, the *Tovarisch* had almost as much power of stopping her by throwing herself up into the wind as a steamer would have had by reversing her engines. The *Tovarisch* was to blame for hard-a-porting and for failure to continue hard-a-starboarding. The result is that I find the *Tovarisch* alone to blame.

1929
THE
TOVARISCH.
III J.

Solicitors for the plaintiffs: *Richards, Butler, Stokes & Woodham Smith.*

Solicitors for the defendants: *Middleton, Lewis & Clarke.*

E. C. M. T.

THE RUAPEHU (No. 2).

1929
July 24, 25.

Shipping—Dockowners—Limitation of Liability—Basis of Limitation—“The Area” over which Dockowner “exercises any power”—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 Vict. c. 32), s. 2, sub-s. 1.

By s. 2, sub-s. 1, of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900: “The owners of any dock . . . shall not, where . . . loss or damage is caused to any vessel . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock . . . owner . . . performs any duty or exercises any power.”

The plaintiffs, a limited company, owned docks at Blackwall in one of which the defendants' vessel *R.* received damage. The *R.* was the largest vessel which had been in those docks within the statutory period, but the plaintiffs also had a controlling interest in docks at Falmouth owned by another limited company in which a larger vessel than the *R.* had been docked:—

Held, that, even assuming the plaintiffs exercised any power over the Falmouth docks within the meaning of the section, those docks were not within “the area” contemplated by the section—namely, the area containing within it the particular dock in which the damage was caused; and that the plaintiffs were entitled to a limitation decree based on the tonnage of the *R.*

1929

LIMITATION OF LIABILITY.

THE
RUAPEHU
(No. 2).

The plaintiffs, R. and H. Green and Silley Weir, Ltd., dock-owners and ship-repairers, sought to limit their liability under s. 2, sub-s. 1, of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, for the damage suffered by the defendants' steamship *Ruapehu* by fire while undergoing repairs by the plaintiffs in one of their dry docks at Blackwall.

By s. 2, sub-s. 1: "The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner, harbour authority, or conservancy authority, performs any duty or exercises any power."

The damage to the *Ruapehu* by the fire was estimated to amount to about 120,000*l.* The liability of the plaintiffs under s. 2, sub-s. 1, based on the tonnage of the largest registered British ship using the plaintiffs' dry docks at Blackwall during the material time—in fact, the *Ruapehu* herself—was 69,067*l.* 7*s.* 2*d.*

The plaintiffs, however, had a controlling interest in docks at Falmouth, owned by the Falmouth Docks and Engineering Company, Ltd., and the question for the Court was whether, if in fact the plaintiffs exercised powers thereover, those docks, in which admittedly a larger vessel than the *Ruapehu* had been docked during the statutory period, were within "the area" contemplated by the section.

Langton K.C. and *Carpmael* for the plaintiffs. It has already been decided in this case (1) that the limitation is

(1) [1927] A. C. 523.

geographical, i.e. the wide language of the section is to be restricted, not by reference to the act done, but by reference to the locality in which the damage occurs. Ship-repairers, who are also dockowners, are entitled to a decree of limitation in respect of damage done in their capacity of ship-repairers to a vessel in a dock within "the area" over which they exercise any power. The words of the section are "the area" not "areas"; and it cannot be said, even assuming the plaintiffs exercise power within the meaning of the section over the docks at Falmouth (which is denied), that those docks are within "the area" in contemplation. Lord Atkinson, when the case was in the House of Lords, evidently thought there was no doubt about the matter, for, although the point now taken had not been argued, he said that in his view the inquiry as to the limitation of liability must be confined "to the condition of things and the occurrences in the docks in which the accident took place." (1)

[*The City of Edinburgh* (2) was also referred to.]

Le Quesne K.C. and *G. St. C. Pilcher* for the defendants. The section does not say "within the area over which such dockowner *as owner* performs any duty or exercises any power." What has to be ascertained is the area over which power is exercised. In fact the plaintiffs carry on one business—at Blackwall and Falmouth—they completely control the Falmouth business, and, in the words of the section, "exercise power" over the docks there. If the plaintiffs' interpretation of the section is correct, two adjoining docks at Blackwall separated by a public road would not be within one "area." The observations of Lord Atkinson (1) had reference to the question decided on that appeal—namely, whether the limitation was geographical or depended on the nature of the act done, and, in any event, were obiter.

No reply was called for.

HILL J. Under s. 2 of the Merchant Shipping Act, 1900, the question as to the amount of the limit of liability is dealt

(1) [1927] A. C. 523, 541.

(2) [1921] P. 274, 277.

1929

THE
RUAPEHU
(No. 2).
HILL J.

with, and the plaintiffs' right to limit under that section is in their capacity as dockowners. It has been held that they are within the terms of the section as the owners of a dock. (1) The *Ruapehu* was damaged by fire in the larger of the plaintiffs' two dry docks at Blackwall. The *Ruapehu* herself was the largest registered British ship which had been in either of those dry docks during the five years ending on May 14, 1923, the date of the fire, and upon the tonnage basis of the *Ruapehu* the limit would be 69,067*l.* 7*s.* 2*d.*

The question is whether, as the defendants contend, the Court must look outside those two dry docks which are within the plaintiffs' ship-repairing yard. A question arose in the course of the hearing whether regard should be had to the dry dock of the Thames Ironworks Company at Canning Town, of which, at the material time, the plaintiffs were the lessees; but that point has become only of academic interest, because it has been ascertained that no ship as big as the *Ruapehu* can have been in that dry dock, it being incapable of containing any ship as large as the *Ruapehu*. That leaves the main question that is raised on the pleadings. It is said that in ascertaining the plaintiffs' limit of liability the Court must look not only at the largest ship which was within the dry dock in which the fire happened, but to some other dry dock, and to some other ship—in this case to docks at Falmouth, because it is said that there are docks at Falmouth in the nominal ownership of the Falmouth Docks and Engineering Company, over which the plaintiffs exercise power. It is said, therefore, that regard must be had to those dry docks, and to the largest British ship which has been in those dry docks within five years before the fire. It is admitted that there was a ship—the *Shropshire*—larger than the *Ruapehu* which was within those dry docks within the period in question. Ought I to pay any attention at all to the fact that there are docks at Falmouth? Assume that it can be made out that the plaintiffs performed duties or exercised powers over such docks, the words of the section are "Within the area over which such dock or canal owner,

(1) [1927] A. C. 523.

harbour authority, or conservancy authority performs any duty or exercises any power." One must find out what was the largest British ship within the five years within an area, and that area has to be the area over which the dock company performs a duty or exercises a power. The words are "the area" not "the areas." An area, I take to be a plain surface the boundaries of which are defined. In the Oxford Dictionary the definition is "the amount of surface contained within given limits," and I was given a quotation from Webster's Dictionary: "a plain surface within bounds." The context in which the phrase "area" is used might show that a different meaning was to be attached to it, but here the context shows that the primary meaning is to be given to the words "the area over which such dock or canal owner . . . performs any duty or exercises any power." Here the two dry docks are within one area—the ship-repairing yard—and over the whole of that area the plaintiffs exercised power. The docks at Falmouth were not within one area with the docks at Blackwall. There were many hundreds or thousands of intervening areas between Blackwall and Falmouth over which the plaintiffs performed no duty and exercised no power at all. If the defendants' contention were right I can see no reason for limiting the inquiry to other docks in the United Kingdom; I see no reason, if they were right, and if a dock in the Thames and a dock at Falmouth are to be considered as within the same area, why a dock on the Thames and at dock at Singapore should not equally be considered as within the same area. But even if there is some reason why consideration should be limited to the United Kingdom it still remains to my mind clear that a dock at Falmouth and a dock at Blackwall must be, so far as the dockowner is concerned, within different areas.

It remains to consider what is the area to which regard should be had. It is in my view that area over which the limiting dockowner performs a duty or exercises a power, which area contains within it the particular dock in which damage has occurred. In this view I think I am much strengthened by what was said by Lord Atkinson when the

1929

 THE
 RUAPEHU
 (No. 2).

HILL J.

1929

THE
RUAFEHU
(No. 2).
HILL J.

case came before the House of Lords (1), because I think he treats that which I am now deciding as being a matter so obvious that it must be taken as granted. That being so I do not feel disposed to go very closely into the question whether it is established that the plaintiffs did exercise power over the area of the Falmouth docks. There is a very close association between the two companies and, indeed, the plaintiffs may be regarded as the dominating or controlling influence; but it still remains that the Falmouth docks were owned by the Falmouth Docks and Engineering Company and not by the plaintiffs.

However, while I am not inclined to assent to the proposition that the plaintiffs did exercise power within the meaning of this section in the Falmouth docks, I do not think it is necessary to consider it, because what I have already said about the meaning of the word "area" determines the issue.

There will be a decree limiting the plaintiffs' liability to 69,067*l.* 7*s.* 2*d.* without prejudice to the question of interest, if any, which can stand over. I do not think it was reasonable to ask me to hold that one area includes several areas, and there will be no order as to costs.

Solicitors for the plaintiffs: *Pritchard & Sons.*

Solicitors for the defendants: *William A. Crump & Son.*

(1) [1927] A. C. 523, 541.

ALSTON v. ALSTON.

1929

July 15.

Divorce—Variation of Settlement—Guilty Spouse—Acceleration of Power to resettle Trust Funds on subsequent Marriage—Interest of Children of dissolved Marriage.

The operation of a power in a marriage settlement for the resettlement of the trust funds of a surviving party to the marriage upon his or her after-taken spouse and the children or issue of his or her subsequent marriage may be accelerated in the event of the dissolution of the marriage so far as to become effective without actual survivorship and during the lifetime of the other party.

By varying the settlement accordingly the Court may effect this acceleration for the benefit not merely of an innocent party but also for that of a guilty spouse on the basis (*inter alia*) of the interest of the children of the dissolved marriage, in the opinion of the Court, being adequately protected by the terms and conditions of the acceleration.

PETITION for variation of settlements.

There were separate ante-nuptial settlements both dated June 6, 1910, of the funds of the parties to the marriage.

There was also a petition for permanent maintenance, but it was agreed that relief should be given by way of variation of the settlements alone.

There were two children of the marriage, both daughters, born respectively in 1914 and 1916. A decree absolute was pronounced on November 7, 1927, dissolving the marriage on the ground of the adultery of the husband.

The petitioning wife was forty-two years of age and the respondent husband forty-one. The income of the wife from her settlement was 500*l.* per annum and she had a reversion to a capital sum of about 40,000*l.* on the death of her mother, aged seventy. The settled fund of the respondent amounted to about 80,000*l.*

Under the settlements each child of the marriage who should attain the age of twenty-five in the lifetime of both parents or the surviving parent was to receive an annual sum of 250*l.*, reducible in certain circumstances. Each of the spouses had the first life interest in their respective settled funds and the second life interest, if surviving, in the fund of the other of them with an ultimate trust for children or

1929
ALSTON
v.
ALSTON.

issue as they should jointly appoint or as the survivor should appoint and subject thereto in trust for the children of the marriage. Both parties had power to resetttle trust funds in the event of a second marriage as follows—namely: To appoint to an after-taken spouse a life interest or any lesser interest in the proportion thereafter mentioned or any less proportion of the trust fund of the party in question and to appoint the proportion thereafter mentioned or any less proportion of it to children or remoter issue by any subsequent marriage or any of them in such shares and subject to such conditions as the party should appoint, but so that the total share of the trust fund to be dealt with in this manner should not bear any greater proportion to the residue of the trust fund than the number of the appointing party's children by any subsequent marriage or marriages who being male should attain the age of twenty-one years or being female should attain that age or previously marry should bear to the number of the children of the first marriage who should attain vested interests in the settled funds.

On June 10, 1929, the registrar to whom the petitions for variation and permanent maintenance were referred submitted by his final report that: (1.) the interest of the respondent in the settlement of the petitioner should be extinguished; (2.) 900*l.* per annum less tax should be paid to the petitioner out of the settled income of the respondent during their joint lives or until the death of the mother of the petitioner; (3.) in the event of the petitioner re-marrying before the death of her mother, 150*l.* per annum free of tax should be paid to each child of the marriage while under twenty-one out of the settled income of the respondent; (4.) the powers of appointment to children and issue should be released and the respondent's power to appoint to an after-taken spouse and his issue by a subsequent marriage should be restricted to the case of a spouse taken by him after the death of the petitioner and the issue of such a spouse; (5.) the petitioner's power to appoint in favour of an after-taken spouse and issue by a subsequent marriage should be restricted to one-third of her settled funds; (6.) no order

should be made for permanent maintenance ; (7.) that costs of the petitioner, children and trustees of both petitions should be paid by the respondent.

1929
ALSTON
v.
ALSTON.

The petitioner gave notice of motion to confirm the report. The respondent gave the following cross-notice of motion—namely, that on the respondent and the petitioner forthwith and subject to their life interests irrevocably appointing by deed a moiety of the respondent's trust funds to be held in trust for the children of the marriage of the respondent and the petitioner in equal shares, the respondent might have power to settle the remaining moiety at any time subject only to his life interest by appointing a life interest therein to any after-taken spouse who might survive him and/or the capital of that moiety in favour of any one or more of his child or children or remoter issue in such manner as he might think fit.

The short effect of affidavit evidence filed on behalf of the respondent was that he was the next tenant in tail of family settled estates calling for considerable expense in the way of maintenance, and that in the event of his remarriage and his having male issue to succeed to the settled estates he ought not to be deprived of the power of making adequate provision to enable such male issue to maintain the estates.

J. V. Nesbitt (*H. W. Barnard* with him), for the petitioner, now consented to the variation of the report in the terms of the cross-notice of motion, provided that the vesting period under any further appointment should be the same as under the original settlement.

T. Bucknill for the children of the marriage of the petitioner and the respondent. I cannot consent to what is proposed, but on the whole the children benefit by the extinction of the interest of the respondent in the petitioner's settled fund, as also by the provision of 150*l.* pin money, and further each of them is assured a fixed sum, and that is an advantage to them not to be jeopardized by opposing the scheme. The only remaining question is whether the respondent should be allowed, as he asks, to have his powers as regards a future

1929
ALSTON
v.
ALSTON.

marriage accelerated. Until the recent case of *Prinsep v. Prinsep* (1) the common course was to postpone during the lifetime of the innocent petitioner the exercise of the powers of the guilty respondent under a settlement to provide for a second wife and children.

Bayford K.C. (R. M. Middleton with him) for the respondent. In *Prinsep v. Prinsep* (2) it is laid down that although the main object of variation is to provide for the innocent parties, the Court should be fair also to the guilty party. That is precisely what the proposed report would effect if variation of this settlement proceeded on the lines suggested in the cross-notice of motion. In this case, in addition to the benefits which the existing children of the marriage will take by the proposed variation of the report, it is manifestly for the advantage of the family as a whole that the respondent should have funds available on the grounds stated in the evidence filed on his behalf.

BATESON J. I think I can accede to the application of the respondent. The Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192, gives the widest possible powers to the Court. Hill J. said in *Prinsep v. Prinsep* (2): "The main object of variation is to make proper provision for the injured spouse and the children of the marriage. And prima facie, settlements ought not to be interfered with further than is necessary for that purpose. But the Court which has annulled the marriage must not only protect the injured party, but also be fair to the wrongdoing party." The learned judge proceeds to cite *Janion v. Janion* (3), where after making provision for the wife the balance of a trust fund proceeding from the husband was transferred to the husband free from the trust. That being so, both spouses agree in this scheme provided that the interests of children under any future appointment vest as provided in the original settlement. The two children of the existing marriage are separately represented, and their

(1) Ante, p. 225.

(2) Ante p. 236.

(3) See footnote ante, p. 237.

counsel neither assents to nor dissents from this scheme. He says that he cannot consent to it, as they are under age; but he does not want to do anything to jeopardize either of them getting now a vested right in 20,000*l.* each, subject to the life interest of their father. On the whole it seems that out of a fund of 80,000*l.*, 40,000*l.* appointed now is a very good proposition from the financial point of view for these two young girls. They might conceivably get nothing out of this settlement in the long run, though I dare say that is not very likely; but, at any rate, they might get much less if they had more brothers and sisters to share in it, if on the death of the mother the father married again and had another family. So that on the whole I think proper provision will be made for them by allowing this scheme to go through, whereby they get a vested interest now in 20,000*l.* each.

1929

ALSTON
v.
ALSTON.
Bateson J.

Solicitors for the petitioner and the children of the marriage :
Halsey, Lightly & Hemsley.

Solicitors for the respondent : *Lydall & Sons.*

R. M. M.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1929, will be as follows:—

In the First Series,
[1929] 1 Ch. [1929] 2 Ch.

In the Second Series,
[1929] 1 K. B. [1929] 2 K. B. [1929] P.

In the Third Series,
[1929] A. C.

INDEX.

ADMINISTRATION—Settled land - 107
 See PROBATE.
— Grant without citation - 164
 See PROBATE.
AGENCY—Harbour master acting as ship's agent—Defective berth - 275
 See SHIPPING.
ALIMONY—Covenant in deed of separation not to sue for—Subsequent decree nisi—Permanent maintenance 1
 See DIVORCE.
ANCHOR—Improper position—Navigation of Milton Creek - 204
 See SHIPPING.
ANCHOR LIGHT—Dumb barge moored alongside vessel at tier - 287
 See SHIPPING.
ASSESSMENT OF DAMAGES—Taxation of costs—Fee to average adjusters 283
 See SHIPPING.
AVERAGE ADJUSTERS—Fee allowed to, on taxation of costs - 283
 See SHIPPING.
BARGE—Moored alongside vessel at tier—Anchor light - 287
 See SHIPPING.
BERTH—Damage at—Harbour master acting as ship's agent - 275
 See SHIPPING.
BOTH TO BLAME—Costs on appeal 109, 190
 See SHIPPING.

CASES:—
— *Bednall v. Bednall* [1927] P. 225.
 Reasoning of decision in, approved and followed *GREEN v. GREEN* 101
— *Bridgett and Hayes' Contract (In re)* [1928] Ch. 163.
 Principle of decision in, followed. *In the Estate of JAMES AND MARION CHRISTIE BORDASS* - 107
— *Bridgett and Hayes' Contract (In re)* [1928] Ch. 163.
 Distinguished. *In the Estate of TAYLOR* - 260
— *Canton (The)* (1928) 31 Ll. L. Rep. 289, 293.
 Observations in, as to costs, commented on and not followed. *THE YOUNG SID* - 109
— *Charlesworth v. Holt* (1873) L. R. 9 Ex. 38.
 Doubted. *HYMAN v. HYMAN. HUGHES v. HUGHES* - 1
— *Dayrell-Steyning v. Dayrell-Steyning* [1922] P. 280. Discussed and explained. *SHERWOOD v. SHERWOOD* 120
— *Dunstanborough (The)* [1892] P. 363n.
 Decision in, considered and explained. *THE VECTIS* - 204
— *Esk (The)* (1869) L. R. 2 A. & E. 350.
 Criterion laid down in, followed. *THE PALEMBANG* - 246
— *In the Estate of James and Marion Christie Bordass* [1929] P. 107.
 Followed. *In the Estate of MARTHA BIRCH* - 164

CASES—continued.

- *Janion v. Janion* (Unreported), p. 237.
Approved and followed. *PRINSEP v. PRINSEP* - - - - - 225
- *Monte Rosa (The)* [1893] P. 23.
Decision in, considered and explained. *THE VECTIS* - - - 204
- *N. v. N.* (1862) 3 Sw. & Tr. 234, 238.
Applied in principle. *STATHAM v. STATHAM* - - - - - 131
- *Reg. v. Jellyman* (1838) 8 Car. & P. 604.
Applied in principle. *STATHAM v. STATHAM* - - - - - 131
- *Rex v. Baskerville* [1916] 2 K. B. 658.
Applied in principle. *STATHAM v. STATHAM* - - - - - 131
- *Rex v. Tate* [1908] 2 K. B. 680.
Applied in principle. *STATHAM v. STATHAM* - - - - - 131
- *Sherwood v. Sherwood* [1928] P. 215.
Affirmed. *SHERWOOD v. SHERWOOD* 120
- *Smith v. Smith* [1923] P. 128.
Approved. *JOHNSTONE v. JOHNSTONE* - - - - - 165
- *Young Sid (The)* [1929] P. 109.
Affirmed. *THE YOUNG SID* - 190

CHANCEL—Repair of—Liability of impropiator - - - - - 240
See ECCLESIASTICAL LAW.

CHILD—Born before marriage of parents subsequently divorced—Order for care and control - - - 101
See DIVORCE.

— Custody—Variation of previous order of Court of summary jurisdiction
See DIVORCE. 157, 245

CHURCH—Liability of impropiator for repairs - - - - - 240
See ECCLESIASTICAL LAW.

COLLISION.
See SHIPPING.

CORK HARBOUR BY-LAWS, 1909—By-laws 41, 53 - - - - - 266
See SHIPPING.

COSTS—In “both to blame” cases on appeal - - - - - 109, 190
See SHIPPING.

— Liability of husband to give security for wife's—Denial of jurisdiction 165
See DIVORCE.

— Principle of provision for wife's costs 114
See DIVORCE.

CRUELTY—Acts of uncleanness - 131
See DIVORCE.

CUSTODY OF CHILD.
See CHILD.

DAMAGE.

See SHIPPING.

DAMAGES — Assessment — Detention — Contractual obligations preventing trading - - - - - 178
See SHIPPING.

— Fee to average adjusters 283
See SHIPPING.

DEED OF SEPARATION—Covenant not to sue for alimony or maintenance—Decree nisi—Permanent maintenance - - - - - 1
See DIVORCE.

DETENTION—Assessment of damages—Contractual obligations preventing trading - - - - - 178
See SHIPPING.

DIVORCE—Charge of Sodomy with Wife—Need for corroborative Evidence—Cruelty—Acts of shameless Uncleanness—Failure to define legal Cruelty in summing up.

STATHAM, J. T. v. STATHAM J. C. C. A. 131

2. — Deed of Separation—Covenant of Wife not to sue for Alimony or Maintenance—Subsequent Decree Nisi on Wife's Petition—Petition for permanent Maintenance—Limitation of Force of Covenant to Duration of Marriage—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190.

HYMAN v. HYMAN. HUGHES v. HUGHES

C. A. 1

3. — Form and Amount of a Resettlement.

PRINSEP v. PRINSEP - - - **Hill J.** 265

4. — Judicial Separation—Periodical Payments—Application by Husband for Suspension or Discharge—Motion or Petition—Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 196—Matrimonial Causes Rules, 1924, rr. 63, 70.

SKIPWITH v. SKIPWITH - - - **C. A. 93**

5. — Permanent Maintenance of Wife—Proportion of Husband's Income—Deduction of Taxes—Current Year—Discretion of Court—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190, sub-ss. 1, 2.

SHERWOOD v. SHERWOOD - - - **C. A. 120**

6. — Post-nuptial Settlement on the Spouses or either of them—Application of Settled Funds—Powers of the Court—Definition of Settlement—Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192.

PRINSEP v. PRINSEP - - - **Hill J.** 225

7. — Practice—Child born before Marriage of Parents subsequently divorced—No previous Declaration of Legitimacy—Order for Care and Control of Child.

GREEN v. GREEN **Lord Merrivale, Pres.** 101

DIVORCE—continued.

8. ——— Costs—Wife's Petition for Divorce—Appearance by Husband under Protest—Denial of Jurisdiction—Issue directed—Liability of Husband to pay and give Security for Wife's Costs of Issue—Interlocutory Proceeding—"Other good cause" for not ordering Security—Matrimonial Causes Rules, 1924, r. 91—Inherent Jurisdiction of Court.

JOHNSTONE v. JOHNSTONE - C. A. 165

9. ——— Costs of Wife—Principle of Provision of Costs—Discretion of Registrar—"Sufficient separate estate"—Capital and Income of Husband and Wife—Allowance under Deed of Separation—Matrimonial Causes Rules, 1924, r. 91.

WILLIAMS v. WILLIAMS (WARD intervening) - - - - Hill J. 114

10. ——— Custody of Child—Previous Order of Court of Summary Jurisdiction—Variation of Order—Guardianship of Infants Acts, 1886 and 1925 (49 & 50 Vict. c. 27, and 15 & 16 Geo. 5, c. 45).

VIGON v. VIGON AND KUTNER

Bateson J. 157; C. A. 245

11. ——— Variation of Marriage Settlement—Guilty Husband—No Issue—Interest of Husband in Settled Fund of Wife in Event of his surviving—Ultimate Trust of Residue of Fund of Wife for her Next of Kin—Interest of Next of Kin preserved—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192.

WEBB v. WEBB - - Bateson J. 159

12. ——— Variation of Settlement—Guilty Spouse—Acceleration of Power to resettle Trust Funds on subsequent Marriage—Interest of Children of dissolved Marriage.

ALSTON v. ALSTON - - Bateson J. 311

DOCKOWNERS—Basis of limitation of liability - - - - 305
See SHIPPING.

ECCLESIASTICAL LAW—Repair of Chancel of Parish Church—Liability of Impropiator—No Notice in Conveyance.

HAUXTON PAROCHIAL CHURCH COUNCIL v. STEVENS - - Consistory Court of Ely 240

EVIDENCE—Need for corroborative, on charge of sodomy with wife - 131
See DIVORCE.

FLARE-UP LIGHTS—Green pyrotechnic light - - - - 293
See SHIPPING.

FOG—Sound signals—"Under way" - 246
See SHIPPING.

HARBOUR MASTER—Ship's agent—Defective berth - - - - 275
See SHIPPING.

IMPROPRIATOR—Of inappropriate rectory—Liability for church repairs - 240
See ECCLESIASTICAL LAW.

INCOME—Proportion of husband's—Wife's maintenance—Taxes - - 120
See DIVORCE.

JUDICIAL SEPARATION—Application for suspension or discharge of periodical payments—Matrimonial Causes Rules - - - - 93
See DIVORCE.

JURISDICTION—Denial of, by husband—Liability to pay and give security for wife's costs - - - 165
See DIVORCE.

LEGITIMACY—No previous declaration of, before divorce of parents - 101
See DIVORCE.

LIMITATION OF LIABILITY—Dockowners—"Area" over which power is exercised - - - - 305
See SHIPPING.

MAINTENANCE—Covenant of wife not to sue for—Subsequent decree nisi—Petition for permanent maintenance - - - - 1
See DIVORCE.

— Permanent—Proportion of husband's income—Deduction of taxes 120
See DIVORCE.

MARRIAGE SETTLEMENT—Variation—Divorce—Interests of next of kin preserved - - - - 159
See DIVORCE.

MATRIMONIAL CAUSES RULES.
See RULES AND ORDERS.

MILTON CREEK—Navigation of—Anchor in improper position - - - 204
See SHIPPING.

NARROW CHANNEL—Navigation of Queenstown Harbour - - 266
See SHIPPING.

PERIODICAL PAYMENTS—Application for suspension or discharge of—Motion or petition - - - - 93
See DIVORCE.

PORT OF LONDON RIVER BY-LAWS.
See RULES AND ORDERS.

POST-NUPITAL SETTLEMENT—Definition—Application of settled funds 225
See DIVORCE.

PRACTICE—Child born before marriage of parents subsequently divorced 101
See DIVORCE.

— Costs in "both to blame" cases
See SHIPPING. 109, 190

— Custody of child—Variation of order of Court of summary jurisdiction 157, 245

PRACTICE—continued.

— Principle of provision for wife's costs **114**
See DIVORCE.

— Wife's costs—Denial of jurisdiction by husband - - - **165**
See DIVORCE.

PROBATE—Administration—Settled Land—Land settled previously to Death of Tenant for Life—Determination of Settlement on Death of Tenant for Life Intestate—General Grant of Administration to Estate of Tenant for Life made to Remainderman under Settlement—Citations.

In the Estate of JAMES AND MARION CHRISTIE BORDASS - - - **Hill J. 107**

2. ——— Settled Land—Land settled previously to Death of Tenant for Life—Determination of Settlement on Death of Tenant for Life—General Grant of Administration to Remainderman under Settlement without Citation—Administration of Justice Act, 1928 (18 & 19 Geo. 5, c. 26), s. 9 (b).

In the Estate of MARTHA BIRCH **Hill J. 164**

3. ——— Settled Land—Compound Settlement under Wills of successive Testators—Death of last Tenant for Life and determination of Trusts under earlier Will—General Probate of Will of last Tenant for Life save and except settled Land—Probate limited to settled Land granted to Tenant for Life under later Will as special Executor of last Tenant for Life under earlier Will—Settled Land Act, 1882 (45 & 46 Vict. c. 38)—Settled Land Act, 1925 (15 Geo. 5, c. 18)—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 22.

In the Estate of TAYLOR - Bateson **J. 260**

PYROTECHNIC LIGHTS—Flare-up lights
See SHIPPING. **293**

QUEENSTOWN HARBOUR—Two narrow channels in - - - **266**
See SHIPPING.

REGISTRAR—Discretion of—"Sufficient separate estate"—Wife's costs **114**
See DIVORCE.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.
See RULES AND ORDERS.

RE-SETTLEMENT—Form of - - - **265**
See DIVORCE.

RULES AND ORDERS:—

— *Cork Harbour By-Laws*, 1909, by-laws 41, 53: **THE ZILLAH** - - - **266**

— *Matrimonial Causes Rules*, 1924, rr. 63, 70: **SKIPWITH v. SKIPWITH** **93**

— *r. 91: WILLIAMS v. WILLIAMS* **114**

— *JOHNSTONE v. JOHNSTONE* **165**

RULES AND ORDERS—continued.

— *Port of London River By-Laws*, 1914-1926, by-laws 5 and 28 (e): **THE PALEMBANG** - - - **246**

— *by-law 14: THE PRINCESS* **287**

— *Regulations for Preventing Collisions at Sea*, 1910, art. 12: **THE TOVARISCH** **293**

— *art. 25: THE ZILLAH* - - - **266**

— *Supreme Court Rules*, Order LXV., r. 1: **THE YOUNG SID** - - - **190**

SAILING SHIP—Navigation of, from bridge forward of poop - - - **293**
See SHIPPING.

SECURITY FOR COSTS.

See COSTS.

SETTLED FUNDS—Application of—Post-nuptial settlement on spouses or either of them - - - **225**
See DIVORCE.

SETTLED LAND—Administration—Citations
See PROBATE. **107**

— Compound settlement under wills of successive testators - - - **260**
See PROBATE.

— Grant of administration to remainderman without citation - - - **164**
See PROBATE.

SETTLEMENT—Definition of post-nuptial **225**
See DIVORCE.

— Variation of—Benefit of guilty spouse
See DIVORCE. **311**

SHIPPING—Assessment of Damages—Taxation of Costs—Claims proved by Average Statement—Fee allowed to Average Adjusters.
THE NORMANSTAR - - - **Hill J. 283**

2. ——— Collision—Damages—Repairs—Contractual Obligations preventing Trading—Detention.

THE YORK - - - **C. A. 178**

3. ——— Flare-up Light—Green pyrotechnic Light—Regulations for Preventing Collisions at Sea, 1910—Sailing Ship navigated from Bridge Forward of Poop.

THE TOVARISCH - - - **Hill J. 293**

4. ——— Narrow Channel Rule—Regulations for Preventing Collisions at Sea, 1910, art. 25—Navigable Channel divided into Two Narrow Channels—Queenstown Harbour—Cork Harbour By-Laws, 1909, by-laws 41, 53.

THE ZILLAH - - - **Hill J. 266**

5. ——— Practice—Both Vessels to blame—Appeal—Variation of Proportions of Blame—Costs.

THE YOUNG SID - Div. Ct. 109; **C. A. 190**

SHIPPING—continued.

6. ——— Sound Signals in Fog—
“Under way”—Vessel turning in the
River—Port of London River By-Laws,
1914–1926, by-laws 5 and 28 (e).

THE PALEMBANG Lord Merrivale, Pres. 246

7. ——— Damage — Anchor Light—Dumb
Barge moored alongside Vessel at Tier—
Barge unattended—Port of London River
By-Laws, 1914–1926, by-law 14.

THE PRINCESS - - - Hill J. 287

8. ——— Contact with Anchor in
improper Position—Navigation of Milton
Creek, River Swale—Milton Creek By-Laws.

THE VECTIS - - - Div. Ct. 204

9. ——— Defective Berth—Agency—
Harbour Master acting as Ship's Agent—
Information acquired as Harbour Master—No
Duty to inform Shipowners—Notice on Quay
containing Exemptions from Liability.

THE HAYLE - - - Bateson J. 275

10. ——— Dockowners—Limitation of Lia-
bility—Basis of Limitation—“The Area”
over which Dockowner “exercises any power”
—Merchant Shipping (Liability of Ship-
owners and Others) Act, 1900 (63 & 64 Vict.
c. 32), s. 2, sub-s. 1.

THE RUAPEHU (No. 2) - - - Hill J. 305

SHIP'S AGENT—Harbour master acting as
—Defective berth - - - 275
See SHIPPING.

SODOMY—Charge of, with wife—Corrobor-
ation - - - 131
See DIVORCE.

STATUTES:—

1882.

45 & 46 Vict. c. 38 (Settled Land):
In the Estate of TAYLOR - - - 260

1886.

49 & 50 Vict. c. 27 (Guardianship of
Infants): VIGON v. VIGON AND
KUTTNER - - - 157, 245

1895.

15 Geo. 5, c. 18 (Settled Land): In the
Estate of TAYLOR - - - 260

— c. 23 (Administration of Estates),
s. 22: In the Estate of TAYLOR 260

STATUTES—continued.

1900.

63 & 64 Vict. c. 32 (Merchant Shipping
(Liability of Shipowners and
Others)), s. 2, sub-s. 1: THE
RUAPEHU (No. 2) - - - 305

1925.

15 & 16 Geo. 5, c. 45 (Guardianship of
Infants): VIGON v. VIGON AND
KUTTNER - - - 157, 245

— c. 49. (Judicature Consolidation),
s. 190: HYMAN v. HYMAN, HUGHES
v. HUGHES - - - 1

— s. 190, sub-ss. 1, 2: SHERWOOD v.
SHERWOOD - - - 120

— s. 192: WEBB v. WEBB - 159

— PRINSEP v. PRINSEP 225

— s. 196: SKIPWITH v. SKIPWITH
93

1928.

18 & 19 Geo. 5, c. 26 (Administration of
Justice), s. 9 (b): In the Estate of
MARTHA BIRCH - - - 164

TAXATION OF COSTS.

See COSTS.

TAXES—Deduction of—Husband's income—
Wife's maintenance - - - 120
See DIVORCE.

TIER—Barge moored alongside vessel at—
Anchor light - - - 287
See SHIPPING.

TRADING—Contractual obligations prevent-
ing—Damages for detention - 178
See SHIPPING.

UNATTENDED BARGE—Moored alongside
vessel at tier - - - 287
See SHIPPING.

VARIATION OF SETTLEMENT.

See SETTLEMENT.

WORDS:—

— “Area”: THE RUAPEHU (No. 2) 305

— “Sufficient separate estate”: WILLIAMS
v. WILLIAMS - - - 114

— “Under way”: THE PALEMBANG 246

THE LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES
KING'S BENCH DIVISION AND PROBATE DIVISION.

(Including Divorce, Admiralty, Ecclesiastical, and Railway and
Canal Commission Cases.)

1929.—VOL. II. K.B. & P.
2 K.B. (p. 117 to p. 222); P. (p. 245 to p. 275).
PART VIII.—AUGUST 7.

TABLE OF CASES. KING'S BENCH DIVISION.

	PAGE
ALDRIDGE v. WRIGHT	C. A. 117
BIRMINGHAM CORPORATION v. INLAND REVENUE COMMISSIONERS ..	C. A. 187
CARLTON HALL CLUB v. LAURENCE	153
FROST v. CASLON	C. A. 138
FROST v. WILKINS	C. A. 138
KIRKBY v. MINTY	165
SHEFFIELD CORPORATION v. LUXFORD	180
SHEFFIELD CORPORATION v. MORRELL	180
SWAITS v. ENTWISTLE	171

PROBATE DIVISION.

	PAGE
PALEMBANG (THE)	246
PRINSEP v. PRINSEP	265
TAYLOR, <i>In the Estate of</i>	260
VIGON v. VIGON AND KUTTNER	C. A. 245
ZILLAH (THE)	266

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.
[For Names of Editors and Reporters see Inside.]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

"THE LAW REPORTS, 1929," for August, consist of—

Chancery Division	Part VIII.
" " Vol. I.	Index.
King's Bench and Probate Divisions	Part VIII.
" " Vol. I.	Index.
Appeal Cases	Part IV.
Complete Current Digest	Part II.
Statutes	Part I.

EDITOR—RT. HON. SIR FREDERICK POLLOCK, BART., K.C.

ASSISTANT EDITOR OF CURRENT DIGEST—J. S. HENDERSON, *Barrister-at-Law.*

ASSISTANT EDITORS OF WEEKLY NOTES { W. IVIMEY COOK, } *Barristers-at-Law.*
{ R. F. STUBBING, }

REPORTERS :

House of Lords	H. B. HEMMING,	<i>Barrister-at-Law.</i>
Privy Council	A. M. TALBOT,	<i>Barrister-at-Law.</i>
Court of Appeal, No. 1 ..	{ W. IVIMEY COOK, H. C. GARSIA, }	<i>Barristers-at-Law.</i>
Court of Appeal, No. 2 ..	{ W. H. GRIFFITH, J. S. HENDERSON, }	<i>Barristers-at-Law.</i>
Mr. Justice Eve	H. LANGFORD LEWIS,	} <i>Barristers-at-Law.</i>
Mr. Justice Romer	J. L. DENISON,	
AND Mr. Justice Maugham ..	K. R. A. HART,	
Mr. Justice Astbury ..	G. R. ALSTON,	} <i>Barristers-at-Law.</i>
Mr. Justice Clauson ..	H. C. HAWKINS,	
AND Mr. Justice Luxmoore ..	A. R. TAYLOUR,	
	P. J. BOLAND,	<i>Barrister-at-Law.</i>
King's Bench Court of Criminal Appeal, Appeals from County Courts and Railway and Canal Commission Cases	{ R. F. STUBBING, J. RITCHIE, W. L. L. BELL, F. PORTER FAUSSET, FITZROY COWPER, G. F. L. BRIDGMAN, }	<i>Barristers-at-Law.</i>
Probate and Divorce ..	R. M. MIDDLETON,	<i>Barrister-at-Law.</i>
Admiralty Cases	E. C. M. TREHERN,	<i>Barrister-at-Law.</i>
Ecclesiastical Cases ..	W. L. L. BELL,	<i>Barrister-at-Law.</i>

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

THE LAW REPORTS, 1929 (Unbound). (Thick or Thin-paper Editions.)

ENTIRE SERIES (together with Statutes, Weekly Notes, and Complete Current Digest)	£	s.	d.
.. .. .	8	16	0
COMPLETE CURRENT DIGEST, 1929 (a Digest, issued quarterly, of all reported cases) (unbound)	1	1	0
CONSOLIDATED DIGEST, 1865-1890 (a Digest of cases reported in the Law Reports) (in cloth)	4	4	0
DECENNIAL DIGEST, 1891-1900 (ditto)	2	2	0
DECENNIAL DIGEST, 1901-1910 (ditto)	2	2	0
DECENNIAL DIGEST, 1911-1920 (a Digest of all reported cases) (in cloth)	4	4	0
WEEKLY NOTES, 1929 (unbound)	1	10	0
INDIAN APPEALS, 1929 (unbound)	1	1	0
INDIAN APPEALS DIGEST, 1872-1923 (in cloth)	2	2	0

The back Years of the *Law Reports*, since 1890, and of the *Indian Appeals*, since 1920, may be obtained on application to the Secretary. The *Weekly Notes*, 1891-1914, and the *Law Reports*, 1918-1920, are out of print.

The Council undertake the binding of their publications. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

PRESENT PRICES FOR OFFICE PATTERN BINDINGS.

LAW REPORTS.				WEEKLY NOTES.			
	Ordinary Edition.		Thin Edition.		Notes of Cases.		Notes of Cases and Miscellaneous
	s.	d.			s.	d.	
Cloth	5	6	7	0 per Vol.	5	9	6
Buckram	7	3	9	0	8	0	8
Half-Calf	8	6	10	3	10	0	10
Half-Morocco	10	0	11	9	11	0	11
Calf	12	0	13	9	14	6	15
Full Morocco (Limp)	—		18	6			

The *Law Reports* and *Statutes* for 1928 consist of 6 Volumes. In the thin paper edition these may be bound as 4 Volumes.

When the Subscriber's address is not more than two miles from the Law Courts no charge will be made for the cost of carriage of bound volumes for the year, beyond that distance but within the London Area 2s. (Thin Edition 1s. 9d.), outside that area but within the United Kingdom (including Northern Ireland) 4s. (Thin Edition 1s. 9d.), and in the Colonies or abroad the full cost will be charged.

Unbound parts should be sent, carriage paid, to 30, Montague Street, London, W.C. 1, as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made.

All sums payable to the Council must be prepaid, and (unless a Banker's Order has been given) should be remitted direct to the Secretary. No issues of the publications for 1929 will be delivered until the subscription has been paid.

Cheques and Money Orders should be made payable to the Council and crossed "& Co., not negotiable." Banker's Commission must be added to the amount of the Subscription in case of every remittance from Ireland, Scotland, the Isle of Man, and the Channel Islands. Remittances from abroad must be made payable in London.

COMMUNICATIONS should be addressed to

THE SECRETARY, COUNCIL OF LAW REPORTING,

30, Montague Street, London, W.C. 1.

**An Indispensable Book for Lawyers
affected by the New Rating Acts.**

KONSTAM'S RATING RELIEF ACTS

Being the Rating and Valuation (Apportionment) Act, 1928, Second Edition, The Local Government Act, 1929, Part V, and the Agricultural Rates Act, 1929.

By E. M. KONSTAM, K.C.

This work is a complete exposition of the Rating Relief Acts, and contains a clear and connected account of the procedure with regard to the Special List, Rights of Objection, and other matters upon which detailed guidance is now necessary.

The Schedules to the 1928 and 1929 Acts are specially dealt with and all Statutory Regulations and Orders made under the Acts are included.

As objections must be lodged before October 1st, 1929, it is essential for all concerned to obtain a copy of the work without delay.

***Just
Published.***

*Price 21s.
Postage 9d.*

**BUTTERWORTH & CO., Bell Yard, Temple Bar,
(Publishers), LTD., London, W.C. 2.
SHAW & SONS, LTD., 7, 8 and 9, Fetter Lane, London, E.C. 4.**

